Selection of Leading Cases

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TRANSFER OF PROPERTY

Supplementary Cases

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TABLE OF CONTENTS

SELECTION OF LEADING CASES.

TRANSFER OF PROPERTY.

Before—MR. JUSTICE MOOKERJEE AND MR. JUSTICE HOLMWOOD.

HAKIM LAL

v

MOOSHAHAR SAHU.

[*Reported in I. L. R. 34 Calc. 999; 6 C. L. J. 410; 11 C. W. N. 889; Since affirmed by Privy Council: See 23 C. L. J. 406 P. C.; 20 C. W. N. 393 P.C.*]

The judgment of the Court was as follows:— 1907 *April 3.*

MOOKERJEE AND HOLMWOOD, JJ. The circumstances which led to the litigations out of which these two appeals arise, so far as it is necessary to state them for the disposal of the questions raised before us, lie in a narrow compass, and although they were the subject of controversy in the Court below, were not disputed before us. On the 14th December 1900, the plaintiffs respondents commenced an action against Krishna Benode Upadhya, one of the defendants in these suits, for recovery of money due under a usufructuary mortgage. The plaintiffs apprehended that the defendant might alienate his properties before judgment, and made an application for attachment *pendente lite*. The application, however, proved infructuous, and was rejected on the 12th February 1901. On the 29th November following, the plaintiffs obtained a decree for a large sum of money against the defendant, and subsequently in execution of this decree attached the properties now in suit. Two claims under section 278 of the Civil Procedure Code, were preferred by two different sets of persons, who are the appellants before us; their claim was founded upon two conveyances alleged to have been executed in their favour on the 2nd September 1901 by the defendant in the suit of the plaintiffs-respondents. The claims were allowed on the 13th September 1902. On the 12th September 1903 the decree-holders

1907
Hakim Lal
v.
Mooshahar Sahu.

commenced the suits out of which these appeals arise under section 283 of the Civil Procedure Code, and in each case they asked for a declaration that the properties in dispute still belonged to their judgment-debtor and were liable to be sold in execution of their decree against him. Suit No. 73 of 1903 impeached the conveyance executed by the judgment-debtor in favour of Lala Hakim Lal; suit No. 74 of 1903 related to the conveyance executed in favour of Kamta Prosad. Both the suits were defended, substantially on the ground that the conveyances were *bonâ fide* and for consideration, and had consequently created a good title in the purchasers which could not be successfully impeached by the execution creditor of the vendor. As regards the conveyance executed in favour of Lala Hakim Lal, the Subordinate Judge found upon the evidence that the consideration recited in the document was genuine, but he set aside the conveyance on the ground that it had not been executed *bonâ fide*, and that the effect of it had been to delay, if not to defeat, the creditors of the transferor. As regards the conveyance executed in favour of Kamta Prosad, the Subordinate Judge found on the evidence that the consideration recited in the document was fictitious, and that it was a contrivance by the vendor to place the property out of the reach of his creditors. In this view of the matter, the Subordinate Judge made a decree in favour of the plaintiffs in both the suits, and declared that the conveyances were inoperative as against the creditors. The purchaser defendant in each case has appealed to this Court. The two appeals have been argued, one after the other, and we propose to deal with them separately. As regards the conveyance executed in favour of Lala Hakim Lal, which was the subject-matter of suit No. 73 of 1903 in the Court below, the question arises in appeal No. 433 of 1904. As regards the conveyance of Kamta Prosad which was the subject-matter of suit No. 74 of 1903, the question arises in appeal No. 440 of 1904. We shall take up the latter case first, because no serious argument was advanced on behalf of the appellant to show that the decision of the Subordinate Judge is erroneous. . . . .

[Their Lordships agreed with the Subordinate Judge and dismissed the appeal.]

1907

Hakim Lal
v.
Mooshahar Sahu.

As regards the conveyance executed in favour of Lala Hakim Lal on the 2nd September 1901, the Subordinate Judge has found that it was for consideration. This finding has not been assailed before this Court on behalf of the plaintiffs respondents, and after an examination of the evidence on the record, we are satisfied that it cannot be successfully impeached. The conveyance recites that the transferor Krishna Binode was indebted to the transferee, Lala Hakim Lal, to the extent of Rs. 30,309, and was also indebted to the extent of Rs. 12,347 to various other creditors whose debts are specifically set out in the document. The total amount of indebtedness of Krishna Binode at the time of execution of this document, so far as the creditors mentioned in the document were concerned, therefore amounted to Rs. 42,656, and the deed purports to convey to Lala Hakim Lal various properties in satisfaction of those debts. The purchaser was to set off against the consideration for the conveyance the debt due to himself, and the remainder of the consideration was to be left in deposit with him for payment to the other creditors, for the obvious reason that most of the debts were secured by mortgages. Now it has been satisfactorily established in the present litigation that the debts mentioned in the document all represented genuine transactions, and the learned Subordinate Judge has found that they were in reality due at the time of the execution of the conveyance. He has further found that not only has the debt due to the purchaser been satisfied by a set off against the consideration for the deed, but also that the sum left in deposit with the transferee for payment to the other creditors has been duly applied in discharge of their claims. These facts have not been, and upon the evidence on the record as it stands cannot be, controverted. The Subordinate Judge, however, has declared the conveyance inoperative, because, in his opinion, the effect of it was to give an undue preference to some out of the many creditors of the transferor. This conclusion has been assailed, on behalf of the appellants, substantially on three grounds, namely: *first*, that inasmuch as the case of the plaintiffs was that the conveyance was nominal and without consideration, and as this case has failed, they are not entitled to succeed on the ground that the transaction was in fraud of the creditors of the transferor; *secondly*, that if the action be treated as one to set aside a fraudulent conveyance under

1907
Hakim Lal
v.
Moosahar Sahu.

section 53 of the Transfer of Property Act, it has not been properly framed, inasmuch as a suit of this description can be maintained only by, or on behalf of, all the creditors of the transferor; and *thirdly*, that in any event, the conveyance is not void or voidable under section 53 of the Transfer of Property Act merely on the ground that, by means of it, preference was given to some among the many creditors of the transferor.

In support of his first contention, it has been argued by the learned vakil for the appellants that the suit was in substance one under section 283 of the Civil Procedure Code, that the object of it was to establish the right which the plaintiffs claimed unsuccessfully in the execution proceedings, and that the only ground upon which they impeached the validity of the conveyance was that it was without consideration, and a mere device on the part of the transferor to keep his property out of the reach of the creditors. It must be conceded that there is considerable force in this contention. An examination of the plaint as a whole convinces us that the suit was not framed with a view to obtain a declaration that the transfer in question was voidable at the option of the plaintiffs, because it had been made with intent to defeat or delay the creditors of the transferor. It is not necessary, however, to deal with this aspect of the case in detail; because in our opinion the appellants are entitled to succeed upon the merits.

In support of his second contention, it was argued by the learned vakil for the appellants that a suit to set aside a conveyance alleged to be fraudulent within the meaning of section 53 of the Transfer of Property Act, must be brought by or on behalf of all the creditors, and that this suit which had not been brought on behalf of all the creditors was not maintainable in its present form. In our opinion this contention is manifestly well founded. It was pointed out by Mr. Justice Telang in the case of *Burjorji Dorabji Patel* v. *Dhun Bai* [1] that a claim to set aside a deed of settlement, on the ground that it is fraudulent and void as against the creditors, can only be enforced in a suit either filed by all, or on behalf of and for the benefit of all the creditors. The same view was adopted by Sir Lawrence Jenkins, C. J., in *Ishvar Timappa Hegde* v. *Devar*

[1] (1891) I. L. R. 16 Bom., 1, 19.

Venkappa [1] in which it was ruled that when a creditor sues to set aside a deed executed by his debtor on the ground that the deed was voidable under section 53 of the Transfer of Property Act, the creditor can only sue on behalf of himself and all the other creditors. This view receives support from the decision of their Lordships of the Judicial Committee in the case of *Chatterput Singh* v. *Maharaj Bahadur*.[2] The question there arose as to the validity of certain transfers alleged to have been made to one Chatterput. The transfers were challenged under section 52 of the Transfer of Property Act, and it was suggested that if they were not actually void under that section, they were at least voidable under section 53 of the Act at the instance of the plaintiffs who had been eventually defeated and defrauded thereby. Their Lordships held that an issue upon such a question could be raised, and a decree could be made only in a suit properly constituted for the purpose, and that the suit as framed, which was between the purchaser on the one hand and one only of the creditors on the other, was not so constituted either as to parties or otherwise. The view, it may be observed, is in harmony with what has been regarded as the settled rule in England, where it has been held that if the settlor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13 Elizabeth Chap. 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the settlor: see *Reese River Silver Mining Co.* v. *Atwell*; [3] see also White and Tudor's Leading Cases on Equity, 7th Edition, Vol. II, p. 882. The rule appears to us to be based upon a perfectly sound and intelligible principle. To allow one creditor to impeach the validity of a conveyance would expose the transferee to separate attacks by different creditors, each of whom might litigate the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusions in different suits brought at the instance of different creditors. We must, therefore, hold that if the present suit be regarded as commenced under section 53 of the Transfer of Property Act, with a view to obtain a declaration that the conveyance in question is voidable at the instance of the creditors of the transferor,

[1] (1902) I. L. R. 27 Bom. 146. [2] (1904) I. L. R. 32 Calc. 198.
[3] (1869) L. R. 7 Eq. 347.

1907
Hakim Lal
v.
Mooshahar Sahu

the suit has not been properly framed and is not maintainable. It was argued, however, by the learned vakil for the plantiffs-respondents that as this objection to the frame of the suit was not taken in the Court below, it is too late for the appellants to raise it now, and that in any event, if the objection prevails, the plaintiffs ought to be allowed an opportunity to amend the plaint, so as to make this a suit on behalf of themselves and all other creditors of the transferor. It cannot be disputed that there is considerable force in this contention. Although, therefore, we must hold that the second ground taken on behalf of the appellants ought to prevail, we are not disposed to dismiss the suit on this ground alone, and we must consequently examine the validity of the third ground upon which the judgment of the Subordinate Judge is assailed.

The third ground taken on behalf of the appellant was that, as the transfer was for adequate consideration, as it was not a mere cloak for the ultimate benefit of the transferor himself, and as most of the debts which were satisfied out of the consideration for the deed were secured by mortgages, the transaction is not voidable under section 53 of the Transfer of Property Act. In support of this position, reliance was placed on the cases of *Alton* v. *Harrison*[1], *Ex-parte Games*[2], *Wood* v. *Dixie*[3], *Sankarappa* v. *Kamayya*[4], *Tillak Chand Hindumal* v. *Jita Mal Sudaram*[5], *Rajan Harji* v. *Ardeshir Hormusji Wadia*[6], *Bhagwant* v. *Kedari*[7], *Hanifa Bibi* v. *Punnamma*[8], *Mahammadunissa Begum* v. *Bachelor*[9], *Rama Samia Pillai* v. *Adi Narayana Pillai*[10]. It was contended on the other hand by the learned vakil for the plaintiffs-respondents that it was not enough to examine whether the conveyance which is the foundation of their title was for consideration, but that the Court must also investigate whether or not it was *bona fide*, and in support of this proposition reliance was placed upon a passage from the judgment of this Court in the case of *Ishan Chunder Das Sarkar* v. *Bishu Sirdar*[11].

[1] (1869) L. R. 4 Ch. 622.
[2] (1879) 12 Ch. D. 814.
[3] (1845) 7 Q. B. 892; 68 R. R. 590.
[4] (1866) 8 Mad. H. C. 231.
[5] (1873) 10 Bom. H. C. 206.
[6] (1879) I. L. R. 4 Bom. 70.
[7] (1900) I. L. R. 25 Bom. 202.
[8] (1906) 17 Mad. L. J. R. 11.
[9] (1905) I. L. R. 29 Bom. 428.
[10] (1897) I. L. R. 20 Mad. 465.
[11] (1897) I. L. R. 24 Calc. 825.

1907

Hakim Lal
v.
Mooshahar Sahu.

We are of opinion that, in order to establish the validity of a conveyance impeached as fraudulent on creditors, it is not enough to prove that it was for consideration: it must also be proved that it was made in good faith. The question, however, remains under what circumstances may a transfer be said to have been made in good faith: to determine this, we have to consider the provisions of section 53 of the Transfer of Property Act. That section, in so far as it applies to the present case, provides that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed; but this does not impair the rights of any transferee in good faith and for consideration. The section, as is well known, is founded upon Statute 13 Eliz. Ch 5, although there has been some divergence of judicial opinion as to how far the Indian law as comprised in section 53 of the Transfer of Property Act was intended to vary from the English law as laid down in ths Statute of Elizabeth: *Bhagwant* v. *Kedari* [1], and *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* [2], the former of which supports the view that the section under consideration did not alter the pre-existing law governing these matters, and the latter supports the view that although the Statute of Elizabeth forms a substantial part of the groundwork of sec. 53, its language is different, and the Indian Code goes much further than the English Statute. One point, however, is fairly beyond the domain of controversy. The third paragraph of section 53, which lays down that nothing contained in the section shall impair the rights of any transferee in good faith and for consideration, is based upon Stat. 13 Eliz. Ch. 5, sec. 6, which protects transfers made "upon good consideration and *boná fide*." We may take it therefore that the Legislature when it used the words 'good faith' in sec. 53, did not intend to depart from the interpretation which had been put upon the term *boná fide* in the Statute of Elizabeth. Reference to English authorities under these circumstances is not only legitimate but essential; as was observed in *Mansell* v. *Reg.* [3], if a statute upon which a particular construction has been long put is re-enacted *ipsissimis verbis*, this construction must be considered

[1] (1900) I. L. R. 25 Bom. 202. [2] (1897) I. L. R. 24 Calc. 825.
[3] (1857) 8 E. & B. 54, 73; 27 L.J., M. C. 4.

1907
Hakim Lal
v.
Moosbahar Sahu.

to have the sanction of the Legislature; likewise, if Acts are framed using the forms of words or clauses in prior Acts which have received judicial construction, unless a contrary intention appears, the Courts will presume that the Legislature has adopted the judicial interpretation, or has used the words in the sense attributed to them by the Courts; this view is amply supported by the observation of James, L.J. in *Ex-parte Campbell*[1], and of Lord Coleridge, C.J. in *Barlow* v. *Teal*[2], and is in no way inconsistent with the rule laid down in *Bank of England* v. *Vagliano*[3] and *Norendra Nath Sircar* v. *Kamalbasini Dasi*[4] to the effect that the language of an enactment by which the law is codified must receive its natural meaning without an assumption that the probable intention of the Legislature was to leave unaltered the law as it existed before. If we turn, therefore, to the leading authorities in England, upon the matter, we find that in *Middleton* v. *Pollock*[5], Sir George Jessel observed that the meaning of the statute is that the debtor must not retain a benefit for himself; it has no regard whatever to the question of preference or priority among the creditors of the debtor. A settlement, therefore, which preferred certain creditors and tended to defeat others, might be good under the Statute of Elizabeth. Nor again is it material under the Statute, whether the assignment by the debtor is of the whole of his property, present or future, or of any part of it. Again, Lord Justice Thesiger in *Ex-parte Games*[6] quotes with approval the words of Giffard, L.J. in *Alton* v. *Harrison*[7]: "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth." It is clear therefore that a deed is *bonâ fide* within the meaning of the Statute of Elizabeth, if it is not a mere cloak for retaining a benefit to the grantor. A similar construction has been put upon sec. 53 of the Transfer of Property Act. Thus in *Natha* v. *Magan Chand*[8], Mr. Justice Chandavarkar pointed out that the

[1] (1870) L. R. 5 Ch., 703.
[2] (1885) 15 Q. B. D., 403.
[3] (1891) A. C. 107.
[4] (1896) I. L. R. 23 Calc. 563.
[5] (1876) 2 Ch. D. 104, 108.
[6] (1879) 12 Ch. D. 324.
[7] (1869) L. R. 4. Ch. 622, 626.
[8] (1903) I. L. R. 27 Bom. 322.

1907
Hakim Lal
v.
Mooshahar Sahu.

test of good faith is whether the transfer is a mere cloak for retaining a benefit to the grantor, or whether it was intended thereby that the grantee should have the property and keep it. The same view was adopted in the case of *Mahrmmadunissa* v. *Bachelor*[1], in which the learned Judges observed that the test of good faith is whether it was a genuine or colourable transaction, and pointed out that, as laid down by Denman, C. J. in *Wood* v. *Dixie*[2], if a conveyance is made *bonâ fide* and with a full intention that the property should be parted with, it will not be fraudulent, if made with intent to defeat a pending or an intended execution, for such a motive does not defeat the assignment. Substantially the same view appears to have been adopted under the law as it existed before sec. 53 of the Transfer of Property Act was added to the statute-book. As an example, reference may be made to *Sankarappa* v. *Kammaya*[3], where it was ruled that if there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution. To the same effect are the cases of *Tillak Chand* v. *Jita Mal*[4], *Rajan Harji* v. *Ardeshir*[5], and *Rama Sami Pillai* v. *Narayana*[6]. If the test laid down in these cases is applied to the circumstances of the present litigation, it is obvious that the plaintiffs are inevitably placed out of Court. It has not been and cannot be disputed that the transfer was for adequate consideration, and was in no sense a mere cloak for the benefit of the grantor; it must be taken, therefore, that the transaction was not only for consideration, but was also entered into in good faith, and cannot consequently be successfully assailed.

Our attention, however, was invited to a passage in the judgment of this Court in the case of *Ishan Chunder Das Sarkar* v. *Bishu Sirdar*[7], in which the learned Judges overruled the extreme contention that all that is necessary to impress upon a transfer the character of good faith within the meaning of sec. 53, is to prove that the transfer is real, and that although

[1] (1905) I. L. R. 29 Bom. 428.
[2] (1845) 7 Q. B. 892; 68 R. R. 590.
[3] (1866) 3 Mad. H. C. 231.
[4] (1873) 10 Bom. H. C. 206.
[5] (1879) I. L. R. 4 Bom. 70.
[6] (1897) I. L. R. 20 Mad. 465.
[7] (1897) I. L. R. 24 Calc. 825.

1907

Hakim Lal
v.
Mooshahar Sahu.

the transferee may share the intention of the transferor to defeat or delay the creditors, he is still a transferee in good faith. It was argued by the learned vakil for the appellants that the rule thus laid down in *Ishan Chunder Das Sarkar* v. *Bishu Sardar*[1] is inconsistent with what has been accepted as the settled construction of the Statute of Elizabeth, and, in support of this view, reliance was placed upon *Wood* v. *Dixie*[2] and *Hale* v. *Saloon Omnibus Co.*[3] After careful examination of these and other cases to which we shall presently refer, we are not prepared, however, to hold that they lay down any inflexible rule which might rightly be regarded as in conflict with the observations contained in the judgment of this Court in *Ishan Chunder Das Sirkar* v. *Bishu Sardar*[1]. The decision in *Wood* v. *Dixie*[2] goes no further than determining that the intent to defeat a particular creditor in the case of a *bonâ fide* sale for value does not, *per se* as a matter of law, render the conveyance fraudulent. We may refer to the judgments in *In re Moroney*[4], in which the case of *Wood* v. *Dixie*[2] is analysed and the true foundation of the decision explained. We agree with the observations of Palles, C.B. that if the intent of the transferor is not only to sell the property but forthwith to abscond with the proceeds so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent, in such cases there would be an intention to defraud creditors which, if the purchaser had notice of it, would avoid the sale. To put the matter in another way, although a transfer, which is a mere cloak for the retention in the grantor of a benefit in the property transferred, is not a transfer in good faith, the test is by no means exhaustive; there may be cases in which the transferee is intended to take an absolute title in the property, but the object of the transferer is to convert land into money and thus place it beyond the reach of the creditors of the grantor; a transfer of this description cannot legitimately be regarded as a transfer made in good faith. A similar view appears to have been adopted by the learned Judges of the Madras High Court in *Chidambaram Chettiar* v. *Sami Aiyar*[5], when they declined to give effect to the contention

[1] (1897) I. L. R. 24 Calc. 825.
[2] (1845) 7 Q. B. 892.
[3] (1859) 4 Drew. 492; 28 L. J. Ch. 777.
[4] (1888) L. R. 21 Ir. 27.
[5] (1906) I. L. R. 30 Mad. 6.

1907

Hakim Lal v. Mooshahar Sahu.

that, whenever there is any real consideration, however small, for the transfer, the question of intention is immaterial, and the transaction must be held to be one entered into in good faith and therefore not inoperative as against creditors, even though it was in fact intended to delay or defeat creditors and had the intended effect. After a careful examination of the authorities on the subject, we are disposed to hold that under the Transfer of Property Act, as under the Statute of Elizabeth, good faith as well as consideration is made in terms an essential condition of the validity of a transfer, and that there may be cases in which a transfer, although made for consideration, may be voidable on the ground that it was made *mala fide*; in other words, in the language of Lord Coke, "a good consideration doth not suffice if it be not also *bona fide*": *Twyne's case* [1].

The distinction is supported by a considerable body of authorities. Lord Mansfield said in discharging a rule for a new trial in *Cadogan* v. *Kennett* [2]: "If the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, and yet being done for the purpose of defeating creditors, the transaction has been held fraudulent and therefore void." To the same effect are his observations in *Worsely* v. *De Mattos* [3], in which he said that if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price to enable him to defeat the creditor's execution, it is fraudulent. Since the time of Lord Mansfield, conveyances founded upon adequate consideration have been held fraudulent by reason of the bad faith of the participants, and the principle has become one of vital interest and paramount importance to the parties concerned. That a conveyance whether it be of real or personal property, founded upon adequate consideration, may be avoided and annulled at the suit of creditors for fraud, is established in an endless variety of cases: see, for instances, *Halbird* v. *Anderson* [4], *Pickstock* v. *Lyster* [5], *Corlett* v. *Radcliffe* [1], *Bott* v.

[1] (1602) 1 Smith L. C. 1.
[2] (1776) 2 Cowper 432.
[3] (1758) 1 Burr. 467.
[4] (1793) 5 Term. R. 235.
[5] (1815) 4 M. & S. 371; 16 R. R. 300.

1907
Hakim Lal
v.
Mooshahar Sahu.

Smith[2], *Golden* v. *Gillam*[3], *In re Sinclair*[4], *Grover* v. *Wakeman*[5], *Stinson* v. *Hawkins*[6]. The same view has been adopted in the American Courts. In *Woolsworth* v. *Williams*[7], Mr. Justice Hoar in delivering the opinion of the Supreme Court of Massachusetts said: "A conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favour of a grantee who participates in that fraudulent intention, although made for a full consideration and by a grantor in the possession of any amount of property." The distinction is brought out nowhere more concisely and effectively than in the judgment of Black, CJ. in *Covanhovan* v. *Hart*[8] in which that learned Judge observes as follows; "If a debtor with the purpose of cheating his creditors, convert his lands into money, because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it, his title is worthless as against creditors, though he may have paid the full price. But the rule is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost." To the same effect is the decision in *Werner* v. *Zierfuss*[9]. The view taken in these cases appears to be substantially identical with the view adopted by this Court in *Ishan Chunder* v. *Bishu Sirdar*[10], in which the learned Judges observed that a transferee for value, who accepts the transfer for the purpose of helping the transferor to convert his immovable property into money which can easily be concealed and kept out of the reach of his creditors and thus defeat or delay the creditors, is not a transferee in good faith within the meaning of

[1] (1860) 14 Moo. P. C. 121, 136.
[2] (1856) 21 Beav. 511.
[3] (1881) 20 Ch. D. 389, 392.
[4] (1884) 26 Ch. D. 319, 338.
[5] (1834) 11 Wendell 192
[6] (1882) 4 Mc. Crary 500 : 13 Fed. 833.
[7] (1868) 100 Mass. 130.
[8] (1858) 21 Pa. St. 500 ; 60 Am. Dec. 57.
[9] (1894) 162 Pa. St. 360 ; 29 Atlantic Rep. 737.
[10] (1897) I. L. R. 24 Calc. 825.

1907
Hakim Lal
v.
Mooshahar Sahu.

section 53. The rule, however, as we have just pointed out, does not apply to the case in which a creditor takes property in satisfaction of an existing debt, although the effect of the transfer to him is to defeat or delay the other creditors of the transferor. It is well settled that in the absence of a Bankruptcy Act, a debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others. The object of a Bankruptcy Act, so far as creditors are concerned, is to secure, as far as practicable, equality of distribution of property of the bankrupt among them ; this, however, is not the object of section 53 of the Transfer of Property Act. It is firmly settled in England that a debtor, provided the transaction is not invalidated as a fraudulent preference under the Bankruptcy law, may openly prefer a particular creditor to the rest, and may transfer property to him for the *boná fide* purpose of discharging his debt, even after the other creditors have brought actions or recovered judgment, and such transfers are not void under the Statute of Elizabeth against the preferred creditors : *Alton* v. *Harrison*[1] *Halbird* v. *Anderson*[2], *Estwick* v. *Cailland*,[3] *Exp. Elliott*,[4] *Exp. Games*[5] *Maskelyne* & *Cooke* v. *Smith*[6], *Morris* v. *Morris*.[7] The learned Subordinate Judge, when he relied upon passages from Benjamin on Sales, 5th Ed., Book III, Chap. III, Sec. IV, pp. 494-6, overlooked this distinction and the history and policy of the Bankruptcy laws in England : *Nunes* v. *Carter*,[8] Parker on Frauds on Creditors, Ch. VII, X and XIII. This is in accordance with the view taken in the cases of *Bhagwant* v. *Kedari*[9] and *Chidambaram* v. *Sami Aiyar*[10], the principle of which appears to us to be consistent with the rule of justice, equity and good conscience. The law favors and rewards the vigilant and active creditor. The right of a debtor to devote his whole estate to the satisfaction of the claims of particular creditors results, as Chief Justice Marshall declares, from that absolute ownership which every man claims over that which is his own :

[1] (1869) L. R. 4 Ch. 622.
[2] (1793) 5 Term. R. 235.
[3] (1793) 5 Term. R. 420.
[4] (1876) 2 Ch. D. 104.
[5] (1879) 12 Ch. D. 314.
[6] (1902) 2 K. B. 158.
[7] (1895) A. C. 625.
[8] (1866) L.R.I.P.C. 342, 348.
[9] (1900) I.L.R. 25 Bom. 202.
[10] (1906) I.L.R. 30 Mad. 6.

1907
Hakim Lal
v.
Mooshahar Sahu.

Brashear v. *West.*[1] If while a man retains his property in his own hands, the right of giving preference should be denied, he would so far lose the dominion over his own that he could not pay anybody, because whoever he paid, would receive a preference. It makes no difference that the creditor and debtor both knew that the effect of the application of the property to the satisfaction of a particular claim would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, but the sole object of the transfer is to pay or secure the payment of a debt, the transaction is a valid one. It cannot rightly be said that a conveyance of property which pays one creditor his just debt and nothing more, is fraudulent as against other creditors of the common debtor. The mere preference in payment of one honest creditor over another is no evidence of fraudulent intent: *Abegg* v. *Bishop.*[2] The distinction is between a transfer of property made solely by way of preference to one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage from it to the debtor, which is fraudulent: *Bonfield* v. *Whipple,*[3] *Giddings* v. *Sears.*[4] In the fair race for preference, if a creditor by diligence secures some advantage, it should be maintained; but if his purpose is not to realise his debt but to help the debtor to cover up his property, he cannot shield himself by showing that his debt was *boná fide*: *Smith* v. *Schwed.*[5] This view is also supported by the case of *In re Moroney*[6] in which Palles, C.B., observed as follows with reference to the Statute of Elizabeth: "Its object was to protect the rights of creditors as against the property of their debtor, and not to regulate the rights of creditors *inter se*, or to entitle them to an equal distribution of their property. The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them, or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to

[1] (1833) 7 Peter 608, 618.
[2] (1894) 142 New York 289.
[3] (1867) 14 Allen, 13 (Mass).
[4] (1874) 115 Mass. 507.
[5] (1881) 9 Fed. Rep. 483.
[6] (1888) L. R. 21 Ir. 27.

their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of, or upon all his property, although the effect of it, or even the intent of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute; because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

Upon a review then of the authorities, and upon an examination of the principles which underlie them, we are of opinion, that the following rule is deducible :—A conveyance or transfer, whether founded on a valuable or adequate consideration or not if entered into by the parties thereto with the intent to hinder, delay or defraud creditors, is void as to them: *Bott* v. *Smith*[1], *Harman* v. *Richards*[2], *Corlett* v. *Radcliff*[3], *Chandler* v. *Von Reader*[4], *Alexander* v. *Todd*[5], *Gilmore* v. *North American Land Co.*[6], *Parrish* v. *Danford*[7]. It is not enough, in order to support a conveyance or transfer as against creditors, that it be made for a valuable consideration; it must also be *bonâ fide*: *Blennerhassett* v. *Sheffman*[8]. When it appears that the parties to a transaction impugned for fraud were actuated by a motive which is denounced as fraudulent, namely a motive to hinder, delay or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is nevertheless void in law: *Macdonald* v. *Hoover*[9]. A mere fraudulent intent on the part of the grantor alone, will not invalidate the transfer, if it is for valuable consideration, and there is no want of good faith on the part of the grantee. Where, however, the transferee is himself a creditor, he occupies a more favored position: *Bamberger* v. *Schoolfield*.[10] In the absence of a law of bankruptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat

[1] (1856) 21 Beav. 511.
[2] (1852) 10 Hare 81.
[3] (1860) 14 Moo. P. C. 121.
[4] (1860) 24 Howard 224.
[5] (1858) 1 Bond. 175; 1 Fed. Cas. 383.
[6] (1817) Peter C. C. 460; 10 Fed. Cas. 413.
[7] (1860) 1 Bond. 345; 18 Fed. Cas. 1231.
[8] (1881) 105 U. S. 100.
[9] (1898) 142 Missouri 484; 44 S. W. 334.
[10] (1895) 160 U. S. 149.

1907

Hakim Lal
v.
Mooshahar Sahu.

their claims, and the creditor had knowledge of such intention; if the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colorable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent. The preferred creditor participates in the fraudulent intent of the debtor, where his purpose is not to secure the payment of his own debt, but to aid the debtor in defeating other creditors, in covering up his property, in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit. Proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent. The reasons for the distinction between one who purchases for a present consideration and one who purchases in satisfaction of a pre-existing debt have been very clearly formulated in the case of *Lockrain* v. *Rastan*.[1] "A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction. Having no motive or interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness; he has an interest to serve; he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and if he goes no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge." These reasons appear to us to be sound and unassailable, and we adopt them in justification of the principle laid down by us.

[1] (1899) 9 North Dakota 434; 81 N. W. 60,

1907
Hakim Lal
v.
Mooshahar Sahu.

If now we apply these principles to the facts of the case before us, it is incontestable that the claim of the plaintiffs is unfounded. It cannot be disputed that the conveyance in favour of Lala Hakim Lal is for adequate consideration. It has been conclusively proved that the debts for the satisfaction of which the transfer was made were genuine debts, and they have all been discharged out of the consideration for the conveyance. It has also been satisfactorily established that the consideration for the deed represented the value of the properties transferred.

Under these circumstances, it is impossible to hold that the conveyance was voidable at the instance of the plaintiffs.

The result, therefore, is that Appeal No. 433 of 1904 must be allowed, the decree of the Subordinate Judge reversed, and the suit dismissed with costs in both the Courts.

The effect of our decision is that the plaintiff-respondents will be at liberty to execute their decree against the properties included in the conveyance executed by their judgment-debtors in favour of Kamta Prosad on the 2nd September 1901, but they cannot proceed against the properties which were, on the same day, conveyed to Lala Hakim Lal.

Appeal No. 433 allowed.
Appeal No. 440 dismissed.

NOTE.—If a conveyance is void as against creditors, it should be because some wrong is thereby done to them.

The question whether a conveyance be fraudulent or not is declared to depend on its being made "upon good consideration and *bona fide*." It is not sufficient that it be upon good consideration or *bona fide*. It must be both. And, therefore, if a conveyance be defective in either particular, although it is valid between the parties and their representatives, yet it will be avoided by the creditors of the debtors. Where a mortgage is made with the intention to defeat, delay or hinder the creditors of the mortgagors the transaction can be avoided by them. The fact that there is valuable consideration will not help the transferee where an intention to defeat or delay the crediters is shown to exist. It is only a piece of evidence to show that the transaction was not fraudulent. In the leading case, their Lordships held that a conveyance, whether it be of real or personal property, founded upon adequate consideration, may be avoided and annulled at the suit of creditors for fraud, and is established in an endless variety of cases. It can only be said to show thatt here may be purposes in the transaction other than the defeating and delaying creditors which would render the case of those who contest the deed more difficult. *Rajani* v. *Gour*, 7 C. L. J. 586. Thus, if a mortgage be void because of an intention participated in by both the parties to delay, hinder

1907
Hakim Lal
v.
Mooshahar Sahu.

or defraud the mortgagor's creditors, it is fraudulent *in toto*, and cannot be supported to any extent against such creditors; it cannot be supported to the extent of an actual debt covered by such a mortgage. *Beal* v. *Williamson*, 14 Allabama 55. The case of *Chidambaram* v. *Sami Aiyar*, I. L. R. 30 Mad. 6 was decided on this principle. See also *Sama Row* v. *Doraisami Chettiar*, 24 M. L. J. 266. It may be that in some cases a transfer may be held good as regards one part and void as against the other. But that will not be simply because a part is transferred for valuable consideration. But it will be held valid in part because it is for valuable consideration and also because no intent to defraud is shown in respect of it. The transferee will have to make out a very clear case that the transfer as regards one part is not fraudulent before the Court will allow a severance. If an intent to defraud is made out the plea of valuable consideration for a part will be utterly unavailing.

A preferential transfer of property to one creditor is not fraudulent as to other creditors, although the debtor in making it intended to defeat their claims, and the creditor had knowledge of such intention. If, however, the transfer is not in reality, a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of the creditors, or if the transaction extends beyond the necessary purpose of mere preference, so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent.

If a debtor retains some interest in property sold by him that fact makes the transaction fraudulent in all cases as a matter of law. If property is sold below its value on the understanding that the seller shall still be entitled to occupy it at a low of rate of rent that may be strong evidence that the transaction is not made in good faith. *Jagat* v. *Radha Nath*, 21 C. L. J. 302 (303).

Section 53 of the Transfer of Property Act being declaratory of a natural equity, its provisions are applicable to transfers of movable property: *Chidambaram* v. *Sami Aiyar*, I. L. R. 30 Mad. 6. Affirmed by Privy Council in I. L. R. 37 Mad. 227.

Before—THE HON'BLE MR. R. F. RAMPINI, ACTING CHIEF JUSTICE, MR. JUSTICE BRETT, MR. JUSTICE MITRA, MR. JUSTICE WOODROFFE AND MR. JUSTICE MOOKERJEE.

ASHUTOSH SIKDAR

v.

BEHARI LAL KIRTANIA.

[*Reported in I. L. R. 35 Calc. 61 F. B.; 6 C. L. J. 320 F. B.; 11 C. W. N. 1011 F. B.*]

The facts of the case are these:—Two holdings belonging to the judgment-debtors, Behari Lal Kirtania and others, were sold on the 15th of August 1904 in execution of a rent decree obtained by Ashutosh Sikdar, the appellant before the High Court, and were purchased by him. He held at the time a subsisting mortgage on the said properties. The judgment-debtors on the 7th of August 1905 applied under section 244 of the Code of Civil Procedure to have the sale set aside. 1907 *Aug. 2.*

The following judgments were delivered:

RAMPINI, A.C.J. The questions referred to us are:—(i) whether, when a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act, the sale is a nullity or an irregular and voidable sale; and (ii) whether the right of redemption of the mortgagor is or is not affected by such sale?

In answer to the first question I think we must, after the expression of opinion of their Lordships of the Privy Council in *Khiarajmal* v. *Daim*[1], reply that a sale held in contravention of the provisions of section 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale. In my opinion, such a sale can be avoided before confirmation of sale by an application under section 244 of the Code of Civil Procedure, without its being necessary for the applicant to show more than that the provisions of the Transfer of Property Act have been contravened. But after confirmation, the sale can only be avoided by an application under section 244, provided

[1] (1904) I. L. R 32 Calc. 296.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania

that the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale.

The case should, therefore, be remanded to the Subordinate Judge to be disposed of after enquiry into these matters and after decision of any other issues that may arise in the case. The costs will abide the result.

It seems neither necessary nor advisable for us to answer the second question put by the referring Bench.

BRETT J. I agree.

MITRA J. I agree.

WOODROFFE J. I agree.

MOOKERJEE J. The questions which have been referred for decision to this Bench are as follows: (i) whether, when a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act, the sale is a nullity or an irregular or voidable sale; (ii) whether the right of redemption of the mortgagor is or is not affected by such sale?

Section 99, upon the construction of which the answer to these questions must primarily depend, provides as follows: "where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43." It is to be observed, in the first place, that the terms of the first portion of the section are very wide. The mortgagee is prevented from bringing the mortgaged property to sale in execution of a decree for the satisfaction of *any* claim, related or extraneous to the mortgage. The obvious intention of the section is to prevent the mortgagee from executing a money decree against the mortgaged property so as to deprive the mortgagor of his right of redemption. In the second place, it is to be observed that, under the section, the only mode in which the mortgagee may bring the mortgaged property to sale, is by the institution of a suit under section 67 of the Transfer of Property Act. At one time, some doubt appears to have been entertained as to the precise

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania

scope of the suit, which the mortgagee was thus required to institute under section 67. Reference may be made to the decision of the Court in *Jadub Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry*[1], in which it appears to have been argued, that the suit contemplated might be based on the charge created by the attachment founded on the money decree. The contention, however, did not find much favour with the Court, and has been subsequently negatived both in Allahabad and in Madras. Thus in *Azimullah* v. *Najmunnissa*[2], the learned Judges of the Allahabad High Court held that the suit which the mortgagee is required to institute by section 99, is a suit under section 67, to enforce the mortgage, and not a suit on the charge created by the attachment. To the same effect is the decision in *Mahabir Singh* v. *Saira Bibi*[3], and a similar view was recently adopted by the learned Judges of the Madras High Court in *Govinda Bhatta* v. *Narain Bhatta*[4]. To this class, the cases of *Matangini Dassee* v. *Chooneymoney Dassee*[5] and *Lachmi Narain Singh* v. *Nand Kishore Lal Das*[6], may be taken to belong, as they affirmed the principle that a suit is necessary to enforce the mortgage or charge before the holder thereof can sell the property and obtain satisfaction of a money decree held by him.

The substance of the section, therefore, is that when the mortgagee has, in execution of a money decree against the mortgagor, effected an attachment of the mortgaged property, he cannot proceed to sell it; he must bring a suit upon the mortgage against all the parties interested in the equity of redemption, and the decree in such suit should be, not for the sale of the equity of redemption, but for the sale of the property, free from the mortgage claim of the plaintiff, and the sale proceeds should be applied, in the first instance, to the discharge of the mortgages on the property, in the order of their priority, and the surplus, if any, towards the satisfaction of the plaintiff's claim under the attachment, so far as may be necessary. If this, then, is the true scope and meaning of section 99, the question next arises as to the precise effect of the violation of its provisions. Upon this question, there has been, as will presently appear, considerable

[1] (1893) I. L. R. 21 Calc. 34.
[2] (1894) I. L. R. 16 All. 415.
[3] (1895) I. L. R. 17 All. 520.
[4] (1906) I. L. R. 29 Mad. 424.
[5] (1895) I. L. R. 22 Calc. 903.
[6] (1902) I. L. R. 29 Calc. 537.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania

divergence of judicial opinion. But before the authorities are reviewed, it is desirable to observe that, upon one preliminary point, there is no difference of opinion. It has been uniformly held, that if a mortgagee in execution of a decree for money, seeks to sell the mortgage property, in contravention of the provisions of section 99, and if objection is taken before the sale, by the holder of the equity of redemption, the objection must be allowed, and the sale prevented. To this effect are the decisions in *Chundra Nath Dey* v. *Burroda Shoondury Ghose*[1], *Aubhoyessury Dabee* v. *Gouri Sunkur Panday*[2], *Rai Ramani Dasi* v. *Surendra Nath Dutt*[3], *Tokhan Singh* v. *Girwar Singh*[4], *Hem Ban* v. *Bihari Gir*[5], *Madho Pershad Singh* v. *Baijnath Tewari*[6], *Kaveri* v. *Ananthayya*[7] *and Kaji Inus Kaji Bapu* v. *Kaji Inus Kajiba*[8]. The view taken in these cases is unquestionably right, for, if the object of section 99 of the Transfer of Property Act is to render it impossible that there should be a sale of the mortgaged property, save by the institution of a suit under section 67, the provisions of the section would be rendered absolutely nugatory, if objection taken before the sale by a person interested in the equity of redemption was not allowed to prevail. The Co irt will not allow the mortgagee to act in defiance of the provisions of the statute, and will not hold a sale at his instance in contravention of the law, if it is apprised of the fact before the sale has taken place. The only question is, what is the effect of the sale if it has actually taken place, and how does it affect the position of the parties. Upon this matter, judicial opinion has been widely divergent.

The cases on the subject, when analysed and classified, will be found to fall into three divisions. In the *first* class of cases, it has been held, that, a sale of the mortgaged property by a mortgagee in execution of a money-decree in contravention of the provisions of section 99, passes no title whatever to the purchaser. In this class of cases, it has been ruled that, as the sale is a nullity, it is not necessary for the person interested in the equity of redemption to take any objection to the sale, or to have it set aside, but he may proceed on the assumption that the sale

[1] (1895) I. L. R. 22 Calc. 813.
[2] (1895) I. L. R. 22 Calc. 859.
[3] (1896) 1 C. W. N. 80.
[4] (1905) I. L. R. 32 Calc. 494.
[5] (1905) I. L. R. 28 All. 58.
[6] (1905) 2 All. L. J. Rep. 356.
[7] (1886) I. L. R. 10 Mad. 129.
[8] (1906) 8 Bom. L. R. 576.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania

has not in any manner affected his rights in the property. In other words, the purchaser acquires no title under the sale, which he can enforce as a plaintiff or set up in defence when he is attacked, and it makes no difference whether he is the mortgagee or a stranger to the proceedings. To this class of cases, belong *Sathuvayyan* v. *Muthusam*[1], *Durgayya* v. *Anantha*[2], *Sheodeni Tewari* v. *Ra n Saran Singh*[3], *Shib Dass Dass* v. *Kali Kumar Roy*[4], *Basiruddi* v. *Kailas Kamini Devi*[5], *Jagannath* v. *Budhowa*[6] and the case of *Husein* v. *Shankrgiri Guru Shambhugiri*[7] seems to support the same view by implication.

In the *second* class of cases it has been ruled, that a sale in execution of a money decree in cotravention of section 99, is an illegal sale which requires to be set aside in order that it may cease to be operative. To this class, belong the cases, of *Vignesmara* v. *Bapayya*[8], *Mayan Pathuti* v. *Pakuran*[9] *Muthuraman Chetti* v. *Ettappasami*,[10] *Thaleri Pathumma* v. *Thandora Mammad*,[11] *Tara Chand* v. *Imdad Husain*[12] *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai*,[13] *Sone Singh* v. *Behari Singh*,[14] *Tanguttoori* v. *Molakalapati*,[15] and *Basdeo* v. *Arjun*.[16] But although these decisions are founded on the common ground, that the sale is not a nullity and is merely voidable because illegal, they do not indicate the same mode for reversal of the sale; some of the cases seem to assume that a regular suit may be maintained for the purpose; others assume that the appropriate procedure is by way of an application under section 244 of the Civil Procedure Code, while the case of *Thaleri* v. *Thandora*,[11] undoubtedly implies that an application under section 244 of the Civil Procedure Code is available to the mortgagor, only if he can establish, that he was not aware of the impending sale before it took place, and was consequently unable to prevent it by a suitable objection in time. Apart from this difference, however, these cases proceed on

[1] (1888) I. L. R. 12 Mad. 325.
[2] (1890) I. L. R 14 Mad. 74.
[3] (1898) I. L. R. 26 Calc. 164.
[4] (1903) I. L. R. 30 Calc. 463.
[5] (1905) I L. R. 33 Calc. 113.
[6] (1906) 7 Punj. L. R. No. 157.
[7] (1898) I. L. R. 23 Bom. 119.
[8] (1893) I. L. R. 16 Mad 436.
[9] (1899) I. L. R. 22 Mad. 347.
[10] (1899) I. L. R. 22 Mad. 372.
[11] (1899) 10 M. L. J. Rep. 110.
[12] (1896) I. L. R. 18 All. 325.
[13] (1905) I. L. R. 27 All. 517.
[14] (1905) I. L R. 33 Calc. 283.
[15] (1907) 17 Mad. L. J. Rep. 217.
[16] (1905) 8 Oudh Cases 327.

1907

Ashutosh Sikdar
v.
Behari Lal Kirtania

the common ground that the sale is not without jurisdiction and is not null and void.

In the *third* class of cases, it has been ruled, that a sale held contrary to the provisions of section 99 is not a nullity and that though voidable, yet even if it is not formally annulled, it does not affect the right of redemption of the mortgagor. To this class, belong the cases of *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni*[1], *Irusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited*[2] and the same principle was explicitly recognised in the cases of *Mayan Pathuti* v. *Pakur a*[3], *Nannuvien* v. *Muthusami Dikshadar*[4], and *Khiarajmal* v. *Daim*[5]. The last two cases, however, were decided independently of the provisions of the Transfer of Property Act, which were not applicable to the transactions in dispute in those litigations : these two cases, therefore, cannot be relied upon as direct authorities upon the matter now in controversy.

The question which now requires consideration is, whether the view indicated in the first class of cases, namely that a sale held contrary to the provisions of section 99 is a nullity, is well-founded on reason and principle. The determination of this question must depend upon the nature of the rule embodied in that section. If it be held, that a sale held contrary to the provisions of section 99 is a sale absolutely without jurisdiction, it may be treated as a nullity ; or if it be held that a sale so held is in contravention of public policy, the same conclusion might follow. If, on the other hand, it was held, that the object of the Legislature was to afford protection to the individual litigant, he might clearly waive the benefit thereof. In this latter view, he might, by pursuit of the appropriate remedy at the proper stage of the proceedings, avail himself of the protection afforded by the statute, or he might, by reason of his omission to do so, lose the benefit thereof. Before, however, we examine the principle of the rule embodied in section 99, it is necessary to deal with an extreme contention of the respondent, namely, that, as a sale in contravention of section 99 is a sale prohibited by the statute in the most emphatic terms, it must necessarily be treated

[1] (1897) I. L. R. 22 Bom. 624.
[2] (1899) I. L. R. 23 Mad. 377.
[3] (1899) I. L. R. 22 Mad. 347.
[4] (1905) I. L. R. 29 Mad. 421.
[5] (1904) I. L. R. 32 Calc. 296.

as a nullity.* This broad contention is supported by neither principle nor authority. It cannot be affirmed as a proposition of law of universal application that non-compliance with every provision of the law makes the proceedings a nullity; see the observations of this Court in the orders of reference to a Full Bench in *Sukh Lal Sheikh* v. *Tara Chand Ta*[1], and *Khosh Mahomed* v. *Nazir Mahomed*[2]. Reference may also be made to five decisions of their Lordships of the Judicial Committee in illustration of this position. The cases of *Tasadduk Rasul Khan* v. *Ahmad Husain*[3] (where a sale had been held in violation of the provisions of section 290 of the Civil Procedure Code), *Gobind Lal Roy* v. *Ram Janam Misser*[4], (where a sale for arrears of revenue was held in contravention of the provisions of sections 5 and 17 of Act XI of 1859), and *Malka-jan* v. *Narhari*[5] (where a sale was held contrary to the provisions of section 248 of the Civil Procedure Code) amply show that there may be cases in which the violation of an express provision of a statute may not nullify the proceedings. On the other hand, the cases of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen*[6] (where an arbitration proceeding was carried on contrary to the provisions of the Bombay Regulation VII of 1827) and *Subrahmania Ayyar* v. *King-Emperor*[7] (where a trial was held in contravention of the rule of joinder of charges embodied in section 234 of the Criminal Procedure Code) afford illustrations of cases in which failure to comply with the provisions of a statute may completely vitiate the proceedings. The only rule, therefore, that may be adopted is that, when the provision of a statute has been contravened, if a question arises as to how far the proceedings are affected by such contravention, it must be determined with regard to the nature, scope, and object of the particular provision which has been violated. As pointed out in Macnamara on Nullities and Irregularities, no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without

[1] (1905) I. L. R. 33 Calc. 68, 71.
[2] (1905) I. L. R. 33 Calc. 352, 357.
[3] (1893) I. L. R. 21 Calc. 66.
[4] (1893) I. L. R. 21 Calc. 70.
[5] (1900) I. L. R. 25 Bom. 337.
[6] (1855) 6 Moo. I. A. 134, 155.
[7] (1901) I. L. R. 25 Mad. 61.

1907

Ashutosh Sikdar v. Behari Lal Kirtania

any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. It may be conceded, that the application of this doctrine to an individual case, may sometimes be attended with difficulty. One test, however, is well established, and is often useful; as was observed by Mr. Justice Coleridge in *Holmes* v. *Russell*[1], "it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." To the same effect are the observations of Mr. Justice Taunton in *Garrett* v. *Hooper*[2]. We shall now consider in the light of these principles, whether a sale held contrary to the provisions of section 99 may rightly be regarded as a nullity. It was argued by the learned vakil for the respondent that a sale of this description is without jurisdiction and consequently null and void. In my opinion, this contention is founded upon a misconception of what is indicated by the jurisdiction of a Court, the nature of which is explained in the Order of Reference in the case of *Sukh Lal Sheikh* v. *Tara Chand Ta*[3] and in the judgment of this Court in the case of *Gurdeo Singh* v. *Chandrikah Singh*[4]. When a mortgagee in execution of a money decree against the mortgagor has effected an attachment of the property comprised in his security, he has a two-fold claim enforceable thereupon, namely, one under the attachment, and the other under the mortgage. All that section 99 provides is, that the property shall be sold, only after a decree for sale has been obtained on the basis of the mortgage. The Court has undoubted jurisdiction over the subject-matter out of which the two debts are to be realised: it is unquestionably competent to exercise a judicial power, namely, the power of sale in relation to it. section 99 only prescribes the mode in which such power is to be exercised. When a sale is, therefore, held in contravention of section 99, the Court cannot be said to exercise a jurisdiction which it does not possess; it can at most be said to assume and exercise, in an irregular manner, the jurisdiction which it possesses. The defect, therefore, is one which is curable by consent or waiver. As

[1] (1841) 9 Dowl. 487.

[2] (1831) 1 Dowl. 28.

[3] (1905) I. L. R. 33 Calc. 68, 71.

[4] (1905) 5 C. L. J. 611.

observed in the cases of *Ledgard* v. *Bull*[1], *Golab Sao* v. *Chowdhury Madho Lal*[2], and *Gurdeo Singh* v. *Chandrikah Singh*[3], it is only where a Court lacks inherent jurisdiction over the subject-matter of the proceeding or action, in which an order is made or a judgment rendered, that such order or judgment is wholly void, with the result that the order may be shown to be a nullity in any proceeding where reliance is placed upon it, although no formal or direct proceeding has been taken to have it vacated or reversed. To such a case, the maxim applies that consent cannot give jurisdiction. But these principles have no application, where the Court possesses inherent jurisdiction over the subject-matter, and merely assumes or exercises that jurisdiction in an irregular or illegal manner; the objection in such a case may be waived, and may, in general, be assumed to be waived, when not taken at the time the exercise of jurisdiction is first claimed to the knowledge of the party affected. These principles make it manifest that a sale held contrary to the provisions of section 99 cannot properly be treated as absolutely null and void, as if it were a sale held without jurisdiction.

It was next argued by the learned vakil for the respondent that the language of section 99 which expressly prevents the mortgagee from selling the mortgaged property in execution of a money decree, is mandatory, and that a sale in violation of that section ought to be treated as a nullity. It is well-settled, however, that no general rule can be laid down as to whether a provision in a statute is absolute or directory. It was ruled by Lord Campbell, L. C. in *The Liverpool Borough Bank* v. *Turner*[4], "that no universal rule can be laid down as to whether mandatory enactment shall be considered directory only, or obligatory, with an implied nullification for disobedience: it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." To the same effect, are the observations of Lord Penzance in *Howard* v. *Bodington* [5] and of Griffith C. J. in *Chanter* v. *Blackwood* [6]. When the object of the statute has been determined, if the statutory provision is not based on

[1] (1886) I. L. R. 9 All. 191; L. R. 13 I.A. 134.
[2] (1905) 2 C. L. J. 384.
[3] (1905) 5 C. L. J. 611.
[4] (1860) 2 DeG. F. & J. 502.
[5] (1877) 2 P. D. 203, 211.
[6] (1904) 1 Com. L. R. 39, 51.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania.

grounds of public policy, and is intended only for the benefit of a particular person or class of persons, the conditions prescribed by the statute are not considered as indispensable and may be waived, because every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, and which may be dispensed with without infringement of any public right or policy. This rule is expressed by the maxim of law, *Quilibet potest renuntiare juri pro se introducto*; any one may renounce a law introduced for his own benefit: Broome's Maxims, 7th Ed., page 531, and Hughes on Procedure Vol. I, page 353; *Rumsey* v. *N. E. R. Co.*[1], *Caledonian Ry. Co.* v. *Lockhart*[2]. As was pointed out by Lord Westbury in *Hunt* v. *Hunt*[3] the word *pro se* were introduced into the maxim, "to shew that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation:" *Park Gate Iron Co.* v. *Coates*[4], *MacAllister* v. *Bishop of Rochester*[5], *Shutte* v. *Thompson*[6], *Montgomery* v. *Edwards*[7], *Wilson* v. *MacIntosh.*[8] In view of these principles, let us consider for a moment, the object of the rule embodied in section 99 of the Transfer of Property Act. It was pointed out by the learned Judges of the Allahabad High Court in *Mahabir Singh* v. *Saira Bibi*[9] that section 99 was enacted with a view to prevent the evil results which followed from sales of mortgaged properties by mortgagees in execution of money decree; these consequences are stated to have been threefold, namely, first, the mortgagor who would ordinarily be entitled to the facilities afforded in a mortgage suit for repayment of the mortgage debt, is summarily deprived of the equity of redemption, secondly, a purchaser would hardly pay full value for the equity of redemption, as he would take subject to the unascertained claim of the mortgagee with the result that the mortgagee himself would purchase the property for a merely nominal sum, and thirdly, that if the purchaser took the property without notice of the mortgage and was subsequently called upon to discharge the incumbrance,

[1] (1863) 14 C. B. N. S. 641, 649.
[2] (1860) 3 Macq. H. L. 808, 822.
[3] (1862) 4 DeG. F. & J. 221, 233.
[4] (1870) L. R. 5 C. P. 634.
[5] (1880) 5 C. P. D. 194.
[6] (1872) 15 Wallace U. S. 151.
[7] (1873) 14 Am. Rep. 618; 46 Vermont 151.
[8] (1904) A. C. 129.
[9] (1895) I. L. R. 17 All. 520.

1907

Ashutosh Sikdar v. Behari Lal Kirtania.

there might be great hardship upon him unless he was afforded the benefit of the doctrine of estoppel: *Muhammad Hamiduddin* v. *Shib Sahai*.[1] Reference may also be made to the cases of *Gobid Hari Dev* v. *Parashram Mahadev Joshi*[2], *Lachmi Narain Singh* v. *Nandkishore Lal Das*,[3] and to the observations of Dr. Whitely Stokes in his Anglo-Indian Codes, Volume I, page 734, where the object with which section 99 was enacted is explained. It may be a matter for controversy whether if regard be had to the decision in *Syud Emam Momtazooddeen Mahomed* v. *Rai Coomar Dass*[4] and *Bhuggobutty Dossee* v. *Shama Charn Bose*[5], the evil which the Legislature had apparently in view, had any real existence; and if so, whether a drastic provision of this character was required to realise the object in view. That enquiry is foreign to our present purpose; this much is beyond controversy that the main object of section 99 was to afford protection to the owner of the equity of redemption. It is sufficient to refer to the judgment of Phear J. in *Brajanath Kundu Chowdhry* v. *Gobindmani Dasi*[6], of Norman J. in *Ram Lochan Sirkar* v. *Kamini Debi*[7], of Macpherson J. in *Kamini Debi* v. *Ram Lochan Sirkar*[8], and of Markby J. in *Neerunjun Mookerjee* v. *Oopendro Narain Deb*[9]; the matter is nowhere dealt with more effectively than in the judgment of Mr. Justice Norman, where upon an elaborate review of the English authorities on the question of the relation of the mortgagee to the mortgaged premises, that learned Judge ruled that a mortgagee ought not to be allowed to sell the morgage property in execution of a mere money claim, and that if he did so and purchased the property himself, he could not acquire an irredeemable title. It is not necessary to consider whether there are, any, and, if any, what qualifications to this principle: Jones on Mortgages, section 711 and sections 1038 to 1046. It is sufficient for our present purpose that this was the principle which the Legislature had in view. If so, as the provision was for the benefit of the person entitled to redeem the mortgage property, he at any rate is entitled to waive it; if with full knowledge of the impending sale in

[1] (1899) I. L. R. 21 All. 309.
[2] (1900) I. L. R. 25 Bom. 161, 167.
[3] (1902) I. L. R. 29 Calc. 537, 543.
[4] (1875) 14 B. L. R. 408; 23 W. R. 187.
[5] (1876) I. L. R. 1 Calc. 337
[6] (1869) 4 B. L. R. O. C. 83.
[7] (1867) 5 B. L. R. 460 (*note*).
[8] (1870) 5 B. L. R. O. C. 450.
[9] (1872) 10 B. L. R. O. C. 57.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania.

execution of a money decree, he allows the property to be sold, if with knowledge that the sale has taken place, he allows the sale to be confirmed, that is, to become final and conclusive, upon what principle can he be allowed to challenge the title of the purchaser, because the sale has been held in contravention of the provisions of section 99. There are no intelligible grounds on which he ought to be permitted to do so. This view is borne out by the decision of their Lordships of the Judicial Committee in *Khiarajmal* v. *Daim*[1] where it was ruled that a sale by a mortgagee on the basis of a money decree for the mortgage debt, and a purchase by him of the equity of redemption in execution, do not relieve him of his obligations as mortgagee, though the sale is not a nullity for want of jurisdiction but is affected by irregularity in procedure only. On these grounds, I must respectfully dissent from the decision in the first class of cases, that a sale in violation of section 99 is a nullity.

The question next arises, what are the rights of the owner of the equity of redemption, when a sale, which is contrary to the provisions of section 99, and which is consequently merely voidable, has been actually held. The second and third classes of cases indicate that his remedies are two-fold; he may either seek to set aside the sale, or he may seek to redeem the property. If he adopts the former alternative, it is reasonably clear that he ought to proceed by way of an application under section 244 of the Civil Procedure Code to set aside the sale, and not by way of a regular suit. The question of the validity of the sale is clearly a question relating to the execution or satisfaction of the decree, and it is a question which arises between the parties to the suit or their representatives; an application for reversal of the sale is, therefore, the proper procedure. But up to what stage of the proceedings is such an application permissible? Obviously, it ought not to be allowed after the sale has been confirmed that is, has become final and conclusive, unless the applicant establishes that by reason of fraud or otherwise, he had not notice of the sale or of the proceedings which led up to it. There is, indeed, one case *Thaleri* v. *Thandora*[2] in which it was held that an application for reversal of the sale ought not to be allowed at all, if the

[1] (1904) I. L. R. 32 Calc. 296; L. R. 32 I. A. 23.
[2] (1899) 10 Mad. L. J. Rep. 110.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania.

judgment-debtor had notice of the sale, and could have prevented it by appropriate objection, before it took place. This view was sought to be supported by reference to the decision of this Court in *Durga Charan Mandal* v. *Kali Prasanna Sarkar* [1], and a similar view was adopted in *Umed* v. *Jasram* [2]. It is to be observed, however, that in *Durga Charan* v. *Kali Prasanna* (2) objection to the validity of the sale was taken and allowed to be taken, after the confirmation of sale, on the ground that the judgment-debtors had no knowledge of the proceedings which led up to the sale and its confirmation. In my opinion, there is an obvious distinction between an application to set aside the sale before its confirmation and another made after the confirmation. Under section 316 of the Civil Procedure Code, the effect of which was examined by this Court in *Bhawani Kumar* v. *Mathura Prosad* [3], the title of the purchaser at an execution sale is not perfected till confirmation, and it does not vest in him before the date of the sale certificate. It is liable to be set aside either under section 310A or 311 of the Civil Procedure Code; if so, there does not appear to be any good reason why it should not be liable to attack on the ground that it has been held contrary to the provisions of section 99 of the Transfer of Property Act. That ground, if established, would, by itself, be sufficient to entitle the judgment-debtor to have the sale set aside. The decree-holder can hardly take up the position, that the judgment-debdtor is stopped by reason of his omission to take objection before the sale, because the decree-holder has with his eyes open, acted in contravention of the provisions of the statute. If, however, the application is made after the confirmation of the sale, the position is different. If the judgment-debtor was aware of the sale, and it has been confirmed with his knowledge, he must be taken to have been a party to that order. Under such circumstances, on what principle can he be permitted to challenge the sale after confirmation? [See Kleber on Void Judicial and Execution Sales, section 436, and Freeman on Void Judicial Sales, section 44.] Section 99 is intended for his protection; assume that before the sale, he was not in a position to judge whether a sale, contrary to that section, would prejudice him, and this may

[1] (1899) I. L. R. 26 Calc. 727.
[2] (1907) 4 All. L. J. Rep. 519.
[3] (1907) 7 C. L. J. 1.

1907

Ashutosh Sikdar v. Behari Lal Kirtania.

be a good reason for his omission to take objection before the sale; but surely, after the sale and before confirmation, he ought to decide whether he will adopt it or challenge its validity. This view is supported by the cases of *Madan Makund Lal* v. *Jamna Kanlapuri* [1] and *Mangli Prasad* v. *Pati Ram* [2]. If, therefore, with full knowledge of the sale, he allows it to be confirmed, he may be taken to have waived the objection. If, on the other hand, the sale has been held, and the confirmation obtained without his knowledge, he is entitled, even after confirmation, to apply for reversal of the sale. Under such circumstances the confirmation would be no bar: see *Durga Charan* v. *Kali Prasanna* [3], *Set Umedmal* v. *Srinath Ray*, [4], *O'Connor* v. *Richards* [5], *Alven* v. *Band* [6], and *Watson* v. *Birch* [7]. But, whether the application is made before or after the sale, the only element which it is necessary for the owner of the equity of redemption to prove to obtain a reversal of the sale is that section 99 has been contravened. It is not necessary to prove any irregularity or substantial injury as would be requisite in a case under section 311 of the Civil Procedure Code. Upon proof that section 99 has been contravened, the sale must be set aside.

The third class of cases, to which reference has been made, affirms the doctrine that a sale held contrary to the principle embodied in section 99 is not a nullity, and if the mortgagee purchases at such a sale, he does not acquire an irredeemable title. The leading decision on the point is that of the Judicial Committee in *Khiarajmal* v. *Daim* [8]. There the mortgagees obtained a decree for money against the mortgagors upon a claim independent of the mortgage; they executed this decree, and purchased the equity of redemption. The mortgrgors then sued to redeem the mortgagees upon the footing that the sale was a nullity. Their Lordships ruled that the sale could not be treated as a nullity, but that the mortgagees had not acquired an irredeemable title. They accordingly allowed the mortgagors to redeem upon payment of what was due upon the mortgage and what had been paid by the mortgagees at the execution

[1] (1898) 2 All. L. J. Rep. 123.
[2] (1904), 1 All. L. J. Rep. 360.
[3] (1899) I. L. R. 26 Calc. 727.
[4] (1900) I. L. R. 27 Calc. 810.
[5] (1837) Sausse & Scully 246.
[6] (1841) Fla. & Kel. 196.
[7] (1793) 2 Ves. 51.
[8] (1904) I. L. R. 32 Calc. 296.

1907

Ashutosh Sikdar
v.
Behari Lal Kirtania

sale for the purchase of the equity of redemption. If the sale is merely voidable, and, therefore stands good till avoided by the appropriate procedure, it is not easy to perceive how the mortgagor can exercise his right of redemption, till the sale has been set aside, and this view has in fact been affirmed in *Madan* v. *Jamna* [1]; but although there may be room for controversy whether the view is strictly logical, it may be observed that it leads to substantial justice, and gives precisely the same result, as would be attained by a reversal of the sale in the first instance, and redemption thereafter; if the sale is set aside upon a proper application made, the mortgagee purchaser gets back the money paid at the execution sale, and the mortgagor is left free to redeem the security. According to the view taken by the Judicial Committee, the mortgagor gets back the property upon payment of precisely the same sum. The result is exactly the same, but the procedure is different; in the former case, there is a successful application to set aside the sale, followed by a suit on the mortgage in which the mortgagor gets an opportunity to redeem; in the latter case, there is a suit for redemption in which the rights of the parties are worked out. It is not necessary for our present purposes to pursue this line of enquiry further, which can properly arise only in a suit for redemption; but I observe that in *Muthu* v. *Karuppan* [2], the learned Judges of the Madras High Court have held that, when the purchaser happens to be not the mortgagee but a stranger, the only course open to the mortgagor is to have the sale set aside by an application under section 244 of the Civil Procedure Code, and he cannot maintain an action for redemption as against the mortgagee and the purchaser at the execution sale. In such a case, if the sale is not reversed, it is the purchaser who becomes the owner of the equity of redemption, and who would be entitled to redeem the mortgage.

The answers, therefore, which I would give to the questions referred to the Full Bench are as follows:

When a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act, the sale is not a nullity: it is an illegal and voidable sale; it may be set aside by an application under section 244 of the Civil Procedure Code at

[1] (1898) 2 All. L. J. Rep. 123. [2] (1907) 17 Mad. L. J. Rep. 163.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania.

any time before it has been confirmed; it may also be set aside by a similar application after confirmation, if the applicant proves that he had no notice of the sale or of the confirmation by reason of fraud or otherwise; the only element which is necessary for reversal of the sale is that section 99 has been contravened. The second question, namely, whether the right of redemption of the mortgagor is or is not affected by such a sale need not be answered, as it arises only in a suit for redemption and not in the present proceedings for reversal of the sale.

If we apply these principles to the case before us, it is obvious that the order of the Court below cannot be sustained. The sale which is impeached took place on the 15th August 1904, and was confirmed on the 27th September following. An application to set aside the sale was made on the 7th August 1905. The sale was attacked on various grounds of fraud, material irregularities and substantial injury. The Court of first instance did not enquire into these allegations but set aside the sale on the ground that it had been held contrary to the provisions of section 99 of the Transfer of Property Act. This order was confirmed on appeal. Clearly, the order must be discharged. Before the sale can be set aside on the ground of contravention of section 99, the applicant must establish that the sale and its confirmation took place without his knowledge. If he proves this, the sale must be set aside: if he fails, the grounds alleged in his original application must be investigated.

Case remanded.

Note—In equity, a mortgagee standing, with respect to the mortgaged property, in the position of a pledgee, and having in that capacity acquired, by his contract with the mortgagee, certain known and defined rights, and come under certain well known obligations, and especially the obligation of restoring the pledged property on payment of the debt, cannot, by any voluntary act of his own, divest himself of the character of mortgagee and the obligations incident to it. He may mark out his right as mortgagee; and in so doing, may foreclose the mortgage, or obtain a decree for sale in the usual course; but in marking out that remedy, the right of the mortgagor to come in and redeem within the time, would be secured to him. *Ramlochan v. Kamini* 5 B. L. R. 460 note (per Norman J).

A sale held in contravention of Sec. 99 of the Transfer of Property Act (Now O. 34 R. 14 of the Code of Civil Procedure) is not a nullity but a mere irregularity. As regards the difference between nullity and irregularity, see page 72, I. L. R. 35 Calc. Non-compliance with every provision of the law does not make the proceedings a nullity. Thus, in the case of a plaint which

is required to be signed and verified, if it has not been duly signed or verified, the plaintiff may be allowed to remedy the defect, if discovered at any stage in the Primary Court or in the Appellate Court, as the defect does not affect the merits of the case or the jurisdiction of the Court. *Mohini* v. *Bungshi*, I. L. R. 17 Calc. 580. So also proceedings taken upon a certificate are not void merely because the requisition under Sec. 9 (2) of the Public Demands Recovery Act was not duly signed. *Mohiuddin* v. *Pirthichand*, 19 C. W. N. 1159. But a decree for rent passed in accordance with a compromise, in contravention of the provisions of Sec. 147A of the Bengal Tenancy Act is not binding on the tenant, as it was made without jurisdiction. *Sarjugsharan* v. *Deckhit*, 17 C. W. N. 496.

1907
Ashutosh Sikdar
v.
Behari Lal Kirtania.

A sale held in contravention of Sec. 99 of the Transfer of Property Act is to be set aside by an application under Sec. 47 of the Code of Civil Procedure, whoever the purchaser may be—the mortgagee himself or a stranger. *Mayan* v. *Pakuran*, I. L. R. 22 Mad. 347; *Lal Bahadur* v. *Abharan Singh*, 13 A.L.J.R. 138; I. L. R. 37 All. 165. The application should be made before confirmation of sale, unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale or confirmation. This is also the view indicated in *Mayan* v. *Pakuran*, I. L. R. 22 Mad. 347 and acted on by the Allahabad High Court in *Kishan Lal* v. *Umrao Singh*, I. L. R. 30 All. 146.

Quilibet potest renunciare juri pro se introducto: Any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour. The words *pro se* were introduced to show that no man can renonce a right, of which the claims of society forbid the renunciation: per Lord Westbury in *Hunt* v. *Hunt*, 31 L. J. Ch. 175. For instance, if an action be brought upon a contract which is shown at the trial to be illegal, it will be dismissed, though the defendant has not pleaded the illegality. *Scott* v. *Brown* (1892) 2 Q. B. 724. Again, a suit will be dismissed by the Court, although limitation was not pleaded by the defendant: S. 3 of the Indian Limitation Act. So a party cannot waive a jurisdiction of the Court.

Any one may waive or renounce the benefit of a principle or rule of law that exists only for his protection. For example, a witness may waive his privilege, and generally a party may waive any relief to which he is entitled when successful in an action, as for example his right to costs out of the other or defeated party.

Although a man may renounce a right or benefit introduced for himself (*pro se introducto*), he cannot renounce that which has been introduced for the benefit of another; thus the rule that a child within the age of nurture cannot be separated from the mother by order of removal, was established for the benefit and protection of the child, and therefore cannot be dispensed with by the mother's consent. *Reg.* v. *Birmingham*, 5 Q. B. 210. See also Sec. 317 of the Indian Penal Code. But a release of the principal debtor discharges the surety. See Indian Contract Act, SS. 134, 135. See also S. 63 of the Indian Contract Act and S. 130 of the Indian Evidence Act.

The maxim is inapplicable where an express statutory direction enjoins compliance with forms which it prescribes. For instance, a testator cannot dispense with the observance of formalities essential to the validity of a will. See Sec. 50 of the Indian Succession Act.

Before—MR. JUSTICE MOOKERJEE AND JUSTICE HOLMWOOD.

GURDEO SINGH

v.

CHANDRIKAH SINGH

AND

CHANDRIKAH SINGH

v.

RASHBEHARY SINGH.

[*Reported in I. L. R. 36 Calc. 193 ; 5 C. L. J. 611.*]

1907 April 10. The judgments of the Court were as follows :

MOOKERJEE J.—The circumstances, which gave rise to the litigation out of which the present appeals arise are in some measure complicated, but although they were in controversy between the parties in the Court below, the facts found by the Subordinate Judge have not been challenged before us. These facts, in so far as it is necessary to state them for the disposal of the questions of law raised in the two appeals, may be briefly stated. On the 23rd November, 1886, the first four defendants in the present suit executed a mortgage in favour of the father of defendant No. 14. The property comprised in the security consisted of a share in Mehal Raipur Chur, which included three villages, Raipur Khas, Kachnath and Burkavi. The mortgagors undertook to repay the loan on the 13th June 1889. Subsequently, on the 1st February, 1898, the plaintiffs purchased from the mortgagee his rights under the security of 1886, and, on the 15th June, 1900, commenced the present action to enforce them. The defendants, against whom relief is claimed or who are sought to be bound by the decree in the present litigation, may be divided into three groups. The first four defendants are the mortgagors ; the next four are some encumbrancers, who have enforced their securities as against the mortgagors ; and the third set of four defendants are other encumbrancers similarly situated.

The transactions, by which these two sets of defendants claim to have acquired an interest in the properties included in

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the mortgage, which is the foundation of the title of the plaintiffs, appear to be as follows. On the 15th December, 1884, the first four defendants executed a mortgage in favour of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st May, 1894, the mortgagees sued to enforce their security, and joined as parties defendants, not only their mortgagors, but also the predecessor in interest of the present plaintiffs, namely, the mortgagee of 1886. On the 21st March, 1895, the mortgagees obtained a decree as against their mortgagors, but their claim was dismissed as against the mortgagee of 1886. Subsequently, they executed this decree and became purchasers of the property comprised in their security. On the 5th May, 1887, the first four defendants executed a mortgage in favour of defendants 5 to 8 and the properties comprised in this security were shares in Mehal Raipur Chur and another property by name Chandharwa. On the 31st May 1894, the mortgagees sued to enforce their security, and joined as parties defendants their mortgagors, as also the mortgagee of 1886. On the 21st March, 1895, the suit was decreed as against the mortgagors, but was dismissed as against the predecessor in title of the present plaintiffs. Subsequently, they executed their decree and became purchasers of the properties comprised in their security.

On the 29th March and 2nd June 1885, the first four defendants executed two mortgages in favour of defendants 9 to 12. The properties comprised in these securities were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit to enforce their security and joined as parties defendants, not only their mortgagors, but also defendants 5 to 8, that is, the mortgagees of 1884 and 1887, defendant 14, that is, the mortgagee of 1886, and the present second plaintiff, who had taken a conveyance from the mortgagee of 1886 for the benefit of himself and the other plaintiff. On the 5th April 1900, the mortgagees obtained a decree, which reserved in favour of defendants 5 to 8 a declaration of priority, not merely in respect of their bond of 1884, but also with regard to a sum of Rs. 1,172 out of the debt due to them under their bond of 1887. The decree, however, directed that the mortgagees should proceed in the first instance against

1907
Gardeo Singh
v
Chandrikah Singh
and
Chandrikah Singh
v
Rashbehary Singh

properties other than Mehal Raipur Chur. On the 23rd November 1900, the mortgagees enforced their decree and purchased Kachnath and Burkavi in partial satisfaction of their dues. This did not, however, affect their right to proceed against Raipur Chur for the realization of the remainder of their dues under their mortgage decree.

In the present case the claim of the plaintiffs under the mortgage of 1886 has been resisted substantially by the two sets of defendants, whom we have described as defendants 5 to 8 and defendents 9 to 12, and the principal point in controversy between the parties is as to the manner in which their respective rights under the different mortgages and execution sales are to be regulated. The learned Subordinate Judge has made the usual mortgage decree in favour of the plaintiffs for Rs. 9,121, and has directed that, if the decretal money is not paid within three months, the mortgaged property Mehal Riapur Chur is to be sold subject to the prior mortgage charge of defendan ts 5 to 8 and subject to the charge of the remaining decretal money of defendants 9 to 12, so that the purchaser at the auction sale will have to pay up the mortgage lien of defendants 5 to 8, and the balance of the judgment debt due to defendants 9 to 12. Against this decree, objection has been taken by all the parties interested. Defendants 5 to 7 have preferred Appeal No. 540 of 1904. The plaintiffs have preferred Appeal No. 566 of 1904 and a memorandum of cross-objection has been presented on behalf of defendants 9 to 12.

On behalf of defendants 5 to 7 the judgment of the lower Court has been assailed substantially on four grounds, namely, *first*, that the Subordinate Judge had no jurisdiction to hear the case; *secondly*, that the decrees obtained by these defendants on the basis of their mortgages of 1884 and 1887 operate as *res judicata*, so that the plaintiffs are not entitled to enforce their security as against the properties purchased by the appellants in execution of the two decrees obtained by them; *thirdly*, that the appellants are entitled to priority over the mortgage of the plaintiffs, not only in respect of their mortgage of 1884, but also in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887; and, *fourthly*, that the plaintiffs are not entitled to

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

interest upon their security at the rate claimed as they had subsequently entered into a valid comprom'se by which they undertook to reduce the rate of interest.

On behalf of the plaintiffs the decision of the Subordinate Judge has been challenged substantially on two grounds, namely, *first*, that the decisions in the suits commenced by the mortgagees of 1884 and 1887 to enforce their securities, which were ultimately dismissed as against the predecessor in interest of the plaintiffs, operate as *res judicata*, and that consequently the plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created; and *secondly*, that defendants 5 to 8 and 9 to 12 are bound to render an account of the profits of the property, of which they have taken possession as purchasers at the sales held in execution of their decrees. On behalf of defendants 9 to 12 the decision of the Subordinate Judge has been challenged on the ground that they are entitled to their costs of the litigation from the plaintiffs, whose claim has substantially failed as against them. We shall first take up the points raised in the appeal of the defendants 5 to 7; but as the question of *res judicata* is raised by these defendants as also by the plaintiffs, it will be convenient, if we discuss this question from the points of view of both the parties.

The *first* ground taken on behalf of defendants 5 to 7 raises the question of jurisdiction of the Subordinate Judge to entertain this suit. The circumstances, so far as it is necessary to state them for the elucidation of this point, appear to be as follows:—The present action was commenced on the 15th June 1900, and it was originally instituted in the Court of the second Subordinate Judge of Shahabad. On the 22nd June 1901, the District Judge transferred the case to his own Court, and it may be presumed that he acted in exercise of the powers conferred upon him by section 25 of the Code of Civil Procedure. On the 24th June following, the suit was dismissed by the District Judge for want of prosecution. The plaintiffs appealed to this Court, and on the 25th February 1904, a Division Bench allowed the appeal and sent back the case to the District Judge for rehearing. After the records had been remitted to the District Judge, the case remained pending in his Court

1907

Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh.

from the 7th June to the 25th June 1904. On the latter date, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. On the 28th June, the case was received by the Subordinate Judge, and the trial lasted from the 28th July to the 18th August 1904. No objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. It is now contended, however, that the Subordinate Judge had no jurisdiction, and, as the question is one of jurisdiction, we have allowed the appellants to take it, although it had not been suggested at any earlier stage of the proceedings. The ground, upon which the objection is founded, is that although under section 25 of the Code of Civil Procedure a District Court has power to withdraw any suit pending in a Court of first instance subordinate to it and to try the suit itself or transfer it for trial to any other subordinate Court competent to try it, the District Court has no power, after it has withdrawn a suit and placed it on the files, to transfer it to any subordinate Court. In support of this position, reliance has been placed upon the cases of *Ram Charittar Roy* v. *Bidhata Roy*[1] and *Sita Ram* v. *Nanni Dulaiya*.[2] It has been argued, on the other hand, by the learned vakil for the plantiffs respondents that there are at least three answers to the contention of the appellants, namely, *first*, that the District Judge had inherent power apart from the provisions of section 25 of the Code of Civil Procedure, to transfer a suit from his Court to that of the Subordinate Judge; *secondly*, that if he did not possess such power, the Subordinate Judge has not acted without jurisdiction, but has at best assumed jurisdiction in an irregular manner, and that consequently the defendants, who had acquiesced in the exercise of such jurisdiction, ought not to be permitted now to question the legality of the proceedings before the lower Court; and *thirdly*, that the defect, if any, is cured by section 578 of the Code of Civil Procedure, inasmuch as the order of transfer might undoubtedly have been made by this Court, if not by the District Court, and that, if any objection had been taken in time before the Subordinate Judge,

[1] (1906) 10 C. W. N. 602

[2] (1899) I. L. R. 21 All. 230.

1907
Gurdeo Singh
v.
Chandrika Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the plaintiffs might also have avoided the defect by the presentation of a new plaint, as no question of limitation could possibly arise upon the admitted facts of the case. In our opinion the contention of the learned vakil for the plaintiffs respondents furnishes, in each of its three branches, a complete and conclusive answer to the plea of want of jurisdiction advanced by the appellants. The case of *Ram Charittar Ray* v. *Bidhata Ray*[1] is, no doubt, an authority for the proposition that, when once a District Judge withdraws a suit to his own file for trial, he is not competent, under section 25 of the Civil Procedure Code, to retransfer it to the Court from which the case had been withdrawn. The case of *Sita Ram* v. *Nanni Dulaiya*[2] appears to go still further, as the learned Judges held that section 25 has no application to a case remanded under section 562. The cases of *Sakharam* v. *Gangaram*[3], *Amir Begam* v. *Prahlad Das*[4] and *Nandan Prasad* v. *W. C. Kenney*[5] also support the view that, where a District Judge has once exercised the powers conferred by section 25 of the Civil Procedure Code and transferred a case to his own Court from that of the Subordinate Judge, he cannot afterwards retransfer such case.

In these cases, however, the Court was not invited to consider whether, apart from the provisions of section 25 of the Civil Procedure Code, the District Court may not have authority to make an order of the description now in question before us. In our opinion, there is considerable force in the contention of the learned vakil for the plaintiffs respondents that as under section 9 of Act XII of 1887, the District Judge has administrative control over all the Civil Courts within the local limits of his jurisdiction, it ought to be held that the District Judge has inherent power to transfer a case from his own Court to that of the Subordinate Judge, specially when, as in the present instance, the order was made for the obvious benefit of the litigants and for the speedy determination of the matter. It has been ruled by this Court in the cases of *Panchanan Singha Roy* v. *Dwarka Nath Roy*[6] and *Hukum Chand Boid* v. *Kamalanand Singh*[7], that the Code of Civil

[1] (1906) 10 C. W. N. 902.
[2] (1899) I. L. R. 21 All. 230.
[3] (1899) I. L. R. 13 Bom. 654.
[4] (1902) I. L. R. 24 All. 304.
[5] (1902) I. L. R. 24 All. 356.
[6] (1905) 3 C. L. J. 29.
[7] (1905) I. L. R. 33 Calc. 927; 3 C. L. J. 67.

1907

Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh.

Procedure was not intended to be, and is not, exhaustive. As was observed in the case of *Rasik Lall Datta* v. *Bidhumukhi Dasi* [1], the Code does not affect the power and duty of the Court in cases where no specific rule exists, and the Court should act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound goneral principles and is not in conflict with them or the intention of the legislature.

We agree entirely with the view indicated in the cases mentioned that the Courts in this country have, in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure, which binds Courts only in so far as it goes; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and it is not possible to maintain the theory that the Court has no power to make a particular order, though .it may be absolutely essential in the interests of justice, unless some section of the Code can be pointed out as a direct authority for it. We are not unmindful that there are, perhaps, observations in the case of *Bidya Moyee Debya Chowdhurani* v. *Surja Kanta Acharji* [2], which may, at first sight, appear to militate against this view, and may lend some colour of support to the contention that a District Judge has no inherent power to transfer a case either from his own Court or from that of an officer under his administrative control, and that the power must be one conferrrd by Statute. The circumstances of that case, however, were of an entirely different description, and it was not intended there to decide the question, which has been raised before us.

We are, therefore, disposed to hold that the District Judge had power, under the circumstances disclosed in the order-sheet, to make the order of transfer, which he did; and we arrive at this conclusion without hesitation, as the result of our view undoubtedly accords with what has been for many years past the well-established practice. We may further point out that, as was laid down by their Lordships of the Judicial Committee in the case of *Syud Tuffuzzool* v. *Rughoo Nath* [3], to proceed to recall and cancel an invalid order is not simply

[1] (1906) I. L. R. 33 Calc. 1094; 4 C. L. J. 406,

[2] (1905) I. L. R. 32, Calc. 875.

[3] (1871) 14 Moo I. A. 40, 51.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rasbehary Singh

permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor; see also *Hiralal Mukhkerji* v. *Premamoyee Debi*[1], where the application of this principle is explained. We are unable to appreciate why this principle should not be applied to the case before us. If the District Judge, who has transferred a case to his Court, discovers that the very object, with which the case was transferred, likely to fail by reason of unforeseen circumstances, it would be unreasonable to hold that it is not competent to him to withdraw the order and restore the case to the Court of the Subordinate Judge.

But it is not necessary to rest our decision on this ground alone, because the second and third branches of the contention of the plaintiffs respondents appear to us to be unanswerable. It was contended by the learned vakil for the respondents that, assuming that the District Judge had no power under the law to transfer a case from his Court to that of the Subordinate Judge, this does not really affect the jurisdiction of the latter officer. Under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject matter of the litigation. The only suggestion, which can be plausibly made, is that he assumed that jurisdiction in an irregular manner. The case, therefore, is not one of absolute want of jurisdiction, but is at best of an irregular assumption of jurisdiction. It was argued on behalf of the respondents that, in such a case as this, the appellants, who had never taken this objection at an earlier stage of the proceedings, were precluded from raising the question now.

In our opinion, this distinction is well founded on principle and is amply supported by authority. In *Ledgard* v. *Bull*[2], their Lordships of the Judicial Committee pointed out that, although jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by his own conduct from objecting to the irregularities in the institution of the suit; and, further, that when a Judge has no inherent

[1] (1905) 2 C. L. J. 306, 309.
[2] (1886) I. L. R. 9 All. 191; L. R. 13 I. A. 134, 144.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rasbehary Singh

jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits, when these are submitted to him. There are numerous authorities, which establish that, when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. To the same effect are the observations of their Lordships in the case of *Meenakshi Naidoo* v. *Subramaniya Sastri*[1], where there Lordships affirmed the view taken in *Ledgard* v. *Bull*[2] and pointed out that a waiver of a right to complain for want of jurisdiction is inapplicable only if there is an inherent incompetency in the Court to deal with the question brought before it, and that no consent can confer upon a Court that jurisdiction, which it never possessed. This distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction has, sometimes, been overlooked.

But the foundation of the distinction is fully explained in the Order of Reference to a Full Bench in the cases of *Sukh Lal Sheikh* v. *Tara Chand Ta*[3] and *Khosh Mahomed Sirkar* v. *Nazir Mahomed*[4]. In the first of these cases, it was pointed out that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, *Rhode Island* v. *Massachussetts*[5]. Such jurisdiction naturally divides itself into three broad heads, namely, with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision: Black on Judgments, section 215.

A Court cannot adjudicate upon subject matter, which does not fall within its province as defined or limited by law; this

[1] (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.

[2] (1886) L. R. 13 I. A. 134; I. L. R. 9 All. 191.

[3] (1905) I. L. R. 33 Calc. 68; 2 C. L. J. 241.

[4] (1905) I. L. R. 33 Calc. 352; 2 C. L. J. 259.

[5] (1838) 12 Peters U. S. 657.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

jurisdiction may be regarded to be essential, for jurisdiction over the subject matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void; it may be set aside by review or appeal, or its nullity may be established, when it is sought to be relied upon in some other proceeding; See Hawes on Jurisdiction, pages 12-16; Hermann on Estoppel, section 110, and *Frankel* v. *Sutterfield*[1].

An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised, is of fundamental importance, but has not always been sufficiently recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in *Pisani* v. *Attorney-General of Gibraltar*[2], their Lordships of the Judicial Committee held that, where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. The same principle was adopted in *Exparte Pratt*[3] and *Exparte May*[4], which are authorities for the proposition that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence; see *Vishnu Sakharam Nagarkar* v. *Krishna Rao Malhar*[5]. Although the objection that a Court is not given jurisdiction over the subject-matter by law, cannot be waived, *Gulab Sao* v. *Chowdhury Madho Lal*[6],

[1] (1890) 19 Atlantic Rep. 898.
[2] (1874) L. R. 5 P. C. 516.
[3] (1884) 12 Q. B. D. 334.
[4] (1884) 12 Q. B. D. 497.
[5] (1886) I. L. R. 11 Bom. 153.
[6] (1905) 2 C. L. J. 384; 9 C.W. N. 956.

1907

Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh.

yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings; *Harkness* v. *Hyde*[1], *Tolland* v. *Sprague*[2], *Rhode Island* v. *Massachusetts*[3].

To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived and is waived when not taken at the time the exercise of the jurisdiction is first claimed, *Hobart* v. *Frost*[4]; Black on Judgments, section 217.

On this ground, we must hold, as regards the second branch of the contention of the respondents, that the defendants have waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge. As regards the third branch of the contention of the respondents, namely, that the objection is entirely devoid of all substance, it is manifest from other considerations. It cannot be disputed that the order of transfer might have been made by the High Court. If, therefore, objection had been taken by the defendants either at the time when the District Judge made his order or at the time when the Subordinate Judge dealt with the case on the merits, it would have been open to the plaintiffs to obtain an order from this Court, which would have cured the defect. It may further be pointed out that, if the objection had been taken at the time, it would have been open to the plaintiffs to present even a new plaint to the Subordinate Judge. Indeed, if the suit be assumed to have been instituted on the day when the Subordinate Judge took cognizance of it, it would not be open to objection on the ground of limitation, because, although the due date upon the bond expired on the 13th June 1889, the liability of the mortgagors was kept alive by acknowledgment made within twelve years from the date of

[1] (1878) 98 U. S. 476.
[2] (1838) 12 Peters U. S. 300.
[3] (1838) 12 Peters U. S. 657, 718.
[4] (1856) 5 Duer N. Y. 672.

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the present suit. From every point of view, therefore, it follows that the appellants are precluded from questioning, at the present stage, the validity of the proceedings before the Subordinate Judge. The first ground taken on behalf of the defendants 5 to 7 consequently fails and must be overruled.

The second ground taken on behalf of defendants 5 to 7 involves the question of *res judicata*, and the *first* ground taken on behalf of the plaintiff raises precisely the same question. But, although the parties are agreed that the decisions in the litigations of 1894 upon the mortgages of 1884 and 1887 operate as *res judicata*, they are not agreed as to the precise effect of those decisions. Defendants 5 to 7 contend that the effect is to preclude the plaintiffs from enforcing their mortgage against the properties purchased by the decree-holders mortgagees in the suits of 1894. The plaintiffs assert, on the other hand, that the effect is to preclude defendants 5 to 7 from setting up their mortgages and thus to place the plaintiffs in the position, which they would have occupied, if the mortgages of 1884 and 1887 had been created. To determine which of these contentions ought to prevail, we have to examine the circumstances of these two litigations; for as was pointed out by this Court, in the cases of *Surjiram Marwari* v. *Barhamdeo Persad* [1] and *Magniram* v. *Mehdi Hossein Khan*, [2] to determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment.

Now, it appears that defendants 5 to 8 commenced suit No. 22 of 1884 to enforce their mortgage of the 15th December, 1884, and they instituted suit No. 21 of 1894 to enforce their security of the 5th May, 1887. In each of these suits they joined as parties defendants, not merely their mortgagors, who are now defendants 1 to 4, but also defendant No. 14, who is the mortgagee of 1886 and is the predecessor-in-title of the present plaintiffs. It will be observed that in the suit to enforce the security of 1884, the mortgagee of 1886 was a necessary party, and an examination of the plaint in that case shows that he was brought

[1] (1905) 1 C. L. J. 337, 349. [2] (1903) I. L. R. 3. Calc. 95.

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

on the record as a puisne encumbrancer interested in the mortgaged premises. He filed a written statement in which he challenged the validity of the plaintiff's mortgage and alleged that it was fraudulent and without consideration. He further pleaded that the plaintiffs had no valid cause of action as against him. Upon these pleadings, issues were raised, one of which was, whether the bond was genuine and *bonâ fide*, and another was, whether the plaintiffs had any cause of action against that defendant. The Subordinate Judge, who tried the case, found that neither party had proved that this particular defendant was in any way interested in the mortgaged property. He also held that the evidence adduced to establish the payment of consideration for the mortgage was not satisfactory or reliable, and that the admission of the mortgagors that they had received the sum alleged to have been advanced was no evidence against the other defendants.

In this view of the matter, the Court dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors, as they had confessed judgment. The decree directed the sale of the mortgaged property only in so far as the mortgagors were concerned. As we have already stated, the mortgagees decree-holders subsequently executed this decree and purchased the property at the execution sale. As regards the mortgage of 1887, the mortgagees, the present defendants 5 to 8, commenced their suit against the mortgagors and the mortgagee of 1886. An examination of the plaint shows that it does not disclose any cause of action against the mortgagee of 1886. It will be observed that the mortgagee of 1866 was not a necessary party to enforce the mortgage of 1887; for, as was explained by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Persad*[1] in a suit to enforce a second mortgage, first mortgagee is not a necessary party. No doubt in one of the paragraphs of the plaint it was alleged that a portion of the consideration money for the mortgage of 1887, namely, Rs. 1,952, had been applied in satisfaction of interest due upon earlier bonds of the 15th December 1884, the 29th March 1885, and the 2nd June 1885; but there was no express prayer that in respect of this sum,

[1] (1905) 1 C. L. J. 337, 351.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the mortgage, though of 1887, might be treated as entitled to priority over the mortgage of 1886. The mortgagee of 1886 defended the suit on the ground that there was no valid cause of action as against him, and also asserted that the mortgage bond, on which the claim was founded, was collusive and without consideration. Upon these pleadings, the Subordinate Judge framed issues, one of which was, whether the bond in suit was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against the mortgagee of 1886. There was no issue raised as to whether the bond of 1887, if genuine, in respect of a portion of the consideration money, entitled to priority over the bond of 1886. The Subordinate Judge found upon the evidence that there was nothing to show whether the alleged mortgagee of 1886 was really interested in the property in suit. He also held that there was no reliable evidence to prove the claim against them. In this view of the matter, he dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors on confession of judgment. The decree directed the sale of the properties included in the mortgage so far as the mortgagors were concerned. The mortgagees subsequently executed this decree and purchased the property at the execution sale. Upon these facts, the learned vakil for defendants 5 to 7, the mortgagees of 1884 and 1887, contends that the present plaintiffs, whose predecessor, the mortgagee of 1886, was a party defendant to the suits of 1894, are precluded by the doctrine of *res judicata* from setting up the mortgage of 1886. In support of this position reliance is placed upon the cases of *Sri Gopal* v. *Pirthi Singh*[1] and *Gopal Lal* v. *Benarasi Pershad Chowdhury*[2].

It is argued on the other hand by the learned vakil for the plaintiffs that as the suits of 1884 were dismissed as against the mortgagee of 1886, defendants 5 to 8 are now precluded from relying upon their mortgages of 1884 and 1887, which they had unsuccessfully attemted to enforce as against their predecessor in the two earlier litigations, to which we have referred. In support of this position, reliance is placed

[1] (1902) L. R. 29 I. A. 118; I.L. R. 24 All. 429.

[2] (1904) I.L.R. 31 Calc. 428.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

upon the decision of their Lordships of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer*[1]. After a careful examination of the authorities upon which reliance is placed on both sides, we are clearly of opinion that the contention of the plaintiffs is well founded and must prevail. It is not necessary to examine minutely the decisions in *Sri Gopal* v. *Pirthi Singh*[2] and *Gopal Lal* v. *Benarasi Pershad Chowdhury*[3], upon which reliance is placed on behalf of the defendants 5 to 8. The true foundation of the doctrine laid down in those cases was fully explained by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Persad*[4]. That principal to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil for the defendants 5 to 8 that the mortgagee of 1886 was bound to establish his title, when he was brought before the Court in the litigations of 1894, and that his omission or failure to do so precluded him from relying upon that title in the present litigation. In our opinion, there is no foundation for this argument. So far as the security of 1887 was concerned the mortgagee of 1886 was, as we have already explained, not a necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their mortgage of 1887 over the mortgage of 1886. But although a suggestion to that effect was made in the plaint, there was no relief expressly claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of 1887 to establish the genuineness of their security as against the mortgagee of 1886. In the same manner so far as the security of 1884 was concerned, although the mortgagee of 1886 was a proper and necessary party, the suit to enforce the claim was unsuccessful by reason of the failure of the mortgagees of 1884 to establish the genuineness of the security as against the mortgagee of 1886. Under these circumstances, it is impossible to hold that merely because the mortgagee of 1886 failed to establish his security in the suits

[1] (1884) I.L.R. 11 Calc. 301, 306.
[2] (1902) L. R. 29 I.A. 118; I. L. R. 24 All. 429.
[3] (1904) I.L.R. 31 Calc. 428.
[4] (1905) 1 C. L. J. 337, 353.

of 1894, such failure in any way precludes him or his representative from now relying on his title under the mortgage.

1907 Gardeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh

The decrees of dismissal, which were made in the suits of 1894, were decrees, which were based on the finding that the mortgages of 1884 and 1887 were not proved to be genuine and for consideration as against the mortgagee of 1886. That finding, therefore, clearly operates as *res judicata* in favour of the mortgagee of 1886. The decrees, which were made, were in accordance with and based on this finding: see *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya.*[1]

On the other hand, the finding that there was no evidence to show that the alleged mortgagee of 1886 was in any way interested in the mortgaged premises, could not be taken as the basis of the judgment of the Court. The decrees might be said to be decrees in spite of that finding, and when the suits were dismissed as against the mortgagee of 1886, it was not open to him to challenge, by way of appeal, the finding of the Subordinate Judge upon the question of the validity of his mortgage. In this view of the matter, that finding does not in any way operate as *res judicata.* See *Run Bahadur Singh* v. *Lucho Koer*[2], *Nundo Lall Bhattacharjee* v. *Bidhoo Mookhy Debee*[3], *Thakur Magundeo* v. *Thakur Mahadeo Singh*[4], *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya*[1] and *Concha* v. *Concha.*[5]

We are not unmindful that in a litigation between the present defendants 9 to 12 on the one hand as plaintiffs, and defendants 1 to 4 (as mortgagors), defendants 5 to 8 (as puisne encumbrancers) and defendant 14 (as subsequent mortgagee), as defendants on the other hand, the present defendants 5 to 8 succeeded in obtaining a declaration that not only in respect of their bond of 1884, but also in respect of a sum of Rs. 1,172 out of the consideration for their bond of 1887, they were entitled to priority over the bond of 1885. That question, however, appears to have been then decided between the present defendants 5 to

[1] (1897) I. L. R. 24 Calc 900.
[2] (1884) I. L. R. 11 Calc. 301, 306.
[3] (1886) I. L. R. 13 Calc. 17.
[4] (1891) I. L. R. 18 Calc. 647.
[5] (1886) L. R. 11 App. Cas. 541, 552.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh

8 and 9 to 12; it is clear that there was no controversy in that litigation between defendants 5 to 6 and 14, the predecessor of the plaintiffs, in respect of this matter. It cannot, therefore, be suggested that the decision in that litigation in any way operates as *res judicata* for, as is now well settled, when an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants: but for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*; see *Maguiram* v. *Mehdi Hossein Khan*[1], *Chajju* v. *Umrao Singh*[2], *Balambhat* v. *Narayanbhat*[3], *Mahammad Kuni Rowthan* v. *Visvanathaiyar*[4] and *Cottingham* v. *Earl of Shrewsbury*.[5]

No materials have been placed before us to show that the decisions in the suit, to which we have referred, was given under circumstances, which could possibly make it operate as *res judicata* between co-defendants. We must, consequently, hold that the decisions in the suits of 1894, brought by defendants 5 to 8 to enforce their mortgages of 1884 and 1887, operate as *res judicata*, and as those suits were dismissed, rightly or wrongly, against the mortgagee of 1886, the defendants 5 to 8 are not entitled to rely upon those mortgages as against the plaintiffs, who now represent the mortgagee of 1886. The true test to be applied to a case of this description is, are the defendants 5 to 8 entitled, after their defeat in the litigations of 1894, to enforce their mortgages of 1884 and 1887 against the mortgagee of 1886? If they are not, and if their remedy was by way of an appeal against the adverse decisions of 1894, they are obviously precluded from falling back upon their mortgages of 1884 and 1887. The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits in which these decrees were made, were dismissed against

[1] (1903) I. L. R. 31 Calc. 95.
[2] (1900) I. L. R. 22 All. 386.
[3] (1900) I. L. R. 25 Bom. 74.
[4] (1902) I. L. R. 26 Mad. 337.
[5] (1843) 3 Hare 627.

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the mortgagee of 1886, they have not obtained a valid title against him or his representative in interest. The Subordinate Judge was, in our opinion, clearly in error in this matter. He proceeded on the assumption that the effect of the dismissal of the suits of 1894 was to leave the parties in the position, which they would have occupied, if the mortgagee of 1886 had never been joined as a party defendant in those suits. This view is obviously unsound. The mortgagee of 1886 was brought before the Court; he challenged the validity of the mortgages of 1884 and 1887, as he was entitled to do, and his resistance was successful. Under these circumstances, the conclusion appears to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1894 and are entitled to enforce their security against the properties in the hands of defendants 5 to 8, precisely as if the mortgages of 1884 and 1887 had no real existence. The second ground advanced on behalf of defendants 5 to 8 must be overruled, and the first ground taken on behalf of the plaintiffs must consequently prevail.

The third ground taken on behalf of defendants 5 to 7 raises the question, whether they are not entitled to priority over the mortgage of 1886, which the plaintiffs seek to enforce, in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887. It is established by the evidence that out of the sum advanced by the defendants 5 to 7 upon the mortgage of 1887 Rs. 100 was paid in satisfaction of the interest due upon a prior mortgage of the 15th December 1884 executed in favour of persons now represented by defendants 5 to 8; another sum of Rs. 1,072 was applied in discharge of interest due on a bond of the 29th March, 1885, and a third sum of Rs. 780 was applied in satisfaction of the interest due on a bond of the 2nd June, 1885. Upon these facts, it is argued by the learned vakil for defendants 5 to 7 that to the extent of these three sums of money, which were applied in satisfaction of interest due on three bonds earlier than that of the present plaintiffs, they are entitled to a declaration of priority. In support of this position, reliance is placed upon the cases of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*[1]

[1] (1884) L. R. 11 I. A. 126; I. L. R. 10 Calc. 1035.

1917

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

Gopal Chunder Sreemany v. *Herambo Chunder Halder* [1] and *Lamba Gomaji* v. *Vishvanath Amrit Tilvankar.* [2]

It is argued, on the other hand, by the learned vakil for the plaintiffs respondents that there are two objections to the right claimed by the defendants, each of which is fatal to their contention. It is pointed out, in the *first* place, that the decision of this question is barred by the principle of constructive *res judicata*, and it is contended, in the *second* place, that upon the admitted facts, the principle of subrogation has no possible application. In our opinion, the argument advanced on behalf of the appellants is not well founded, and their contention must be overruled. It is manifest that this claim for priority might and ought to have been set up in the litigation of 1894 in which the mortgage of 1887 was enforced. (Jones on Mortgages, sections 1439-41 and 1589A, 6th edition, Vol. II, pages 397 and 526). Indeed, as we have already pointed out, the mortgagees did set out in their plaint circumstances sufficient to form the foundation of the claim now advanced. It was not, however, pressed, and the suit appears to have been dismissed so far as the mortgagee of 1886, was concerned. There is, therefore, considerable force in the contention that it is no longer open to the mortgagees of 1887 to set up in the present litigation the claim for priority, which might and ought to have been adjudicated upon in the litigation of 1894. See *Sri Gopal* v. *Pirthi Singh*[3], *Mahabir Prasad Singh* v. *Macnaghten*[4], *Kameswar Prasad* v. *Rajkumari Ruttun Koer*[5]. It is not necessary, however, to rely upon this ground, as a question might arise as to whether the doctrine of constructive *res judicata* is applicable where the subject-matters of the two suits are different: *Surjiram Marwari* v. *Barhamdeo Pershad*[6]. We are satisfied, however that the second branch of the contention of the learned vakil for the respondent must be sustained. That contention, in substance, is *twofold*, namely, *first*, that the doctrine of subrogation entitles a person to the benefit of a mortgage in favour of a stranger, either when he is

[1] (1889) I. L. R. 16 Calc. 523.
[2] (1893) I. L. R. 18 Bom. 86.
[3] (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429.
[4] (1889) L. R. 16 I. A. 107; I. L. R. 16 Calc. 682.
[5] (1892) L. R. 19 I. A. 234; I. L. R. 20 Calc. 79.
[6] (1905) I. 1, C. L. J. 337, 353.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh

compelled to pay it off to protect an interest of his own in the property mortgaged or by an agreement; and *secondly*, that in any event, the entire amount of a senior encumbrancer must be paid before subrogation can be claimed.

The first of these points raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus explained by Mr. Justice Sutherland in *Ellisworth* v. *Lockwood*[1] "Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and there is no room or occasion for subrogation by operation of law." Consequently, it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The foundation of the rule was elaborately examined in a recent case, *Wilkins* v. *Gibson*[2], in which Mr. Justice Cobb stated the rule to be that a "Subrogation will arise only in those cases, where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor." This distinction between the position of a person, who pays off a mortgage to protect an interest of his own and the position of another, who claims subrogation by agreement, is well marked, and is said to have been borrowed from the Civil Law, which

[1] (1870) 42 N. Y. 89. [2] (1901) 113 Georgia 31; 38 S. E. 374.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

recognised two kinds of subrogation, namely, "legal subrogation" which took place of right and without any agreement as such by the creditor and as a matter of equity, and "conventional subrogation" which was applied, where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. See Howe's Studies in the Civil Law, 1905, page 256: see also *Bank* v. *Tillman*[1], where the doctrine of conventional subrogation is examined. The case of *Gokaldas Gopaldas* v. *Puran Mul Premsukhdas*[2], where it was held that the purchaser of an equity of redemption, who had paid off the first charge, might use the first mortgage as a shield agaist mesne encumbrancers, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an illustration of the former class of cases. The case of *Jagatdhar Narain Prasad* v. *A. M. Brown*[3], furnishes an illustration of the *second* class of cases; whereas the decision of their Lordships of the Judicial Committee in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[4] shows, the line dividing the class of cases, where no bargain is made when the money is advanced, and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own. This doctrine is nowhere mere clearly and concisely expounded than in the judgment of the Supreme Court of the United States in *Etna Life Insurance Company* v. *Middleport*[5], where the principle laid down by Chancellor Johnson in *Gadsden* v. *Brown*[6] and by Chancellor Walworth in *Sandford* v.

[1] (1898) 106 Georgia 55, 31 S. E. 794.
[2] (1884) L. R. 11 I. A. 126, I. L. R. 10 Calc. 1035.
[3] (1906) I. L. R. 33 Calc. 1133.
[4] (1901) L. R. 29 I. A. 9; I. L. R. 29 Calc. 154.
[5] (1887) 124 U. S. 525.
[6] (1843) Speers, Eq. (S. C.) 37.

1907 Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh.

McLean[1] was adopted as well founded on reason. That principle is, that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession, *Shin* v. *Budd*[2]. Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer, *Arnold* v. *Green*[3]. To the same effect, are the decisions in *Crippen* v. *Chappel*[4], *Hough* v. *Etna Life Insurance Company*[5] and *Watson* v. *Wilcox*[6]. The learned vakil for the respondents placed reliance upon passages from Sheldon on Subrogation, sections 240-243, which fully bear out his contention and the position is further strengthened by the expositions contained in Jones on Mortgages, section 874 (6th Edition, Vol. I, page 918), and Harris on Subrogation, sections 792-797. If these doctrines which appear to us to be based on principles of justice, equity and good conscience, are applied to the case before us, it becomes manifest that the claim put forward on behalf of defendants 5 to 7 is entirely unfounded. When a portion of the money advanced by them was applied in part satisfaction of the interest due on earlier bonds, it could not be said that they were compelled to make the payment to protect an interest of their own in the property mortgaged to them; much less could it be suggested that there was any agreement, express or implied, upon which a claim for subrogation could be founded. There is a second answer, however, as the learned vakil for the respondents has pointed out, to this claim for subrogation. The sums were applied only in part satisfaction of the claim for interest due upon earlier bonds, and it is difficult to appreciate how, under such circumstances, a claim for subrogation could arise. The person, who makes the payment, cannot, by simply paying

[1] (1832) 3 Paige N. Y. 122.
[2] (1862) 14 N. J. Eq. 234.
[3] (1889) 116 N. Y. 566.
[4] (1886) 35 Kansas 459; 57 Am. Rep. 187.
[5] (1870) 57 Ill. 318; 11 Am. Rep. 18.
[6] (1876) 39 Wis. 643; 20 Am. Rep. 63.

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an incumbrance which is senior to his own. This doctrine is based upon a perfectly intelligible principle; for as we have already explained, subrogation is by redemption, and unless there is redemption, it is not easy to perceive how subrogation can take place, *Merritt* v. *Hosmer*[1], *Street* v. *Beal*[2], *O'Reilly* v. *Holt*[3], *Carter* v. *Neal*[4]. It is obvious that the contrary view would lead to endless difficulties. It would enable a person, who has made a part payment of the interest due on a mortgage security, to claim subrogation; would he then occupy the position of a joint mortgagee with the person whose claim is partially satisfied? What would be his position with regard to interest subsequently accruing upon the prior mortgage, and how are the rights to be worked out if, as in the case before us, the prior mortgagees have already sued and enforced their security? The rule, therefore, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense, is based upon good sense and ought to be adopted as applicable to the case before us, Sheldon on Subrogation, sections 14, 19, 25, 70 and 83; Harris on Subrogation, section 29. To use the language in *Hollingworth* v. *Floyd*[5] "it would not subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which would only be to give distinct interests in the same debt to both creditor and surety." This view is in no way inconsistent with that taken by the learned Judges of the High Court in *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar*[6]. On the grounds, therefore, that

[1] (1858) 11 Gray (Mass) 276; 71 Am. Dec. 713.
[2] (1864) 16 Iowa 68; 85 Am. Dec. 504.
[3] (1877) 4 Woods C. C. 645; 18 Fed. Cases 792.
[4] (1858) 24 Georgia 346; 71 Am. Dec. 136.
[5] (1807) 2 Harris & Gill (Maryland) 91.
[6] (1893) I. L. R. 18 Bom. 86.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

the position of defendants 5 to 7 did not entitle them to claim the benefit of the principle of subrogation, and that partial payment was not sufficient to entitle them to succeed to the rights of the prior encumbrancer by subrogation, we must overrule the third ground upon which the decision of the Subordinate Judge is sought to be assailed.

The fourth ground, upon which the decision of the Subordinate Judge is challenged on behalf of defendants 5 to 7 is that the plaintiffs are not entitled to claim interest at the rate specified in the mortgage of 1886, inasmuch as on the 18th June, 1889, they entered into a compromise with their mortgagors, by which they undertook to reduce their claim for future interest to 6 per cent. per annum. In answer to this contention, it is argued on behalf of the plaintiffs respondents that the compromise in question is inoperative in law, as it was not registered under section 17 of the Registration Act. The facts, so far as a statement of them is necessary for the decision of this point, are not disputed before this Court. It appears that in 1899 the present defendant 14, the mortgagee under the bond of 1886, sued the mortgagors for recovery of interest due at the time of institution of that suit. On the 18th June, 1889, a petition of compromise was filed on behalf of the parties. It recited that the plaintiffs had been paid Rs. 100 in cash, that the balance of Rs. 593 was to be paid within the 4th February, 1890, and that upon failure to do so, interest would run upon the decretal amount at the rate of 60 per cent. per annum. The compromise further contained a term by which the mortgagee agreed to accept future interest on the entire amount of debt covered by the bond, at the rate of 6 per cent. per annum. This compromise was recited in the preamble to the decree, which was made in that litigation. The decree, however, was based on that portion only of the compromise, which related to the subject-matter of that suit, as is required by section 375 of the Code of Civil Procedure. No decree was made in respect of the covenant by the mortgagee to reduce the claim for future interest to 6 per cent. annum. Upon these facts, it is contended on behalf of defendants 5 to 7 that the compromise is operative, though not registered, because it was recited

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

in the decree. In support of this position reliance is placed upon the cases of *Bindesri Naik* v. *Ganga Saran Sahu* [1] and *Raghubans Mani Singh* v. *Mahabir Singh* [2]. It is argued, on the other hand, by the plaintiffs respondents that the petition of compromise, in so far as it related to matters beyond the scope of the suit, in which it was filed, required to be registered, and this view is sought to be supported by a reference to the cases of *Pranal Anni* v. *Lakshmi Anni*[3], *Muthayya* v. *Venkataratnam*[4], *Birbhadra Rath* v. *Kalpataru Panda*[5] and *Patha Muthammal* v. *Esup Rowther*[6]. In our opinion, the contention advanced on behalf of the plaintiffs respondents is well founded and must prevail. The point is really concluded by the decision of their Lordships of the Judicial Committee in *Pranal Anni* v. *Lakshmi Anni*[3], the true effect of which was explained in *Birbhadra Rath* v. *Kalpataru Panda*[5]. After a careful examination of all the authorities on the subject, we adopt the view put forward in that case. A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act, and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect however, to the settlement touching properties extraneous to the litigation, the decree is, to that extent, clearly without jurisdiction and is inoperative. In relation to these extraneous properties, the parties, must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immovable property exceeding Rs. 100 in value. The same view was adopted by this Court in the case of *Kali Charan Ghosal* v. *Ram Chandra Mandal*[7]. The case of *Raghubans Mani Singh* v. *Mahabir Singh*[8], upon which much stress was laid on behalf of the appellants, appears to be based upon a misapprehension of the judgment of their Lordships of the Judicial Committee in *Pranal Anni* v. *Lakshmi Anni*[3]. With all respect for the learned judges, who decided that case, we find ourselves entirely unable to

[1] (1897) I.L.R. 20 All. 171; L. R. 25 I.A. 9.
[2] (1905) I. L. R. 28 All. 78.
[3] (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 508.
[4] (1901) I. L. R. 25 Mad. 553.
[5] (1905) I. C. L. J. 388.
[6] (1906) I. L. R. 29 Mad. 365.
[7] (1903) I. L. R. 30 Calc. 783
[8] (1905) I. L. R. 28 All. 78.

1907

Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

adopt their view, and we are supported in our conclusion by the decision of the Madras High Court in *Patha Muthammal* v. *Esup Rowther*[1], *Muthayya* v. *Venkataratnam*[2] and *Achuta Ram Raja* v. *Subbaraju*[3]. If the view adopted by the learned Judges of the Allahabad High Court in *Raghubans Mani Singh* v. *Mahabir Singh* [4] is well founded, litigants may, as was pointed out in *Birbhadra Rath* v. *Kalpataru Panda*[5], evade with impunity the provisions of the Registration Act, the Stamp Act, the Court-fees Act and the Civil Courts Act, which last defines the jurisdictions of different classes of Courts. We are unable to persuade ourselves to hold that this is what was intended by their Lordships of the Judicial Committee. It has not been disputed, and it cannot be disputed, that the petition of compromise in question purported to extinguish title to or interest in immovable property of a value exceeding Rs. 100. We must consequently hold that it is inoperative, because it was not registered. The fourth ground taken on behalf of defendants 5 to 7 cannot consequently be supported.

The first ground taken on behalf of the plaintiffs respondents, who have preferred a separate appeal, relates to the question of *res judicata*, and has already been disposed of in connection with the second ground taken on behalf of defendants 5 to 7.

The second ground taken on behalf of the plaintiffs raises the question, whether defendants 5 to 7 would not be bound to account for the profits received by them during their possession of the mortgaged properties after their purchase at the execution sale and whether these defendants are entitled to have interest at the contract rate specified in their securities calculated after the dates of their respective decrees. Both these contentions would seem to be well founded, and it is sufficient to refer to the case of *Ganga Das Bhattar* v. *Jogendra Nath Mitra*[6], which is entirely in accord with the decision of their Lordships of the Judicial Committee in *Kedar Lal*

[1] (1906) I. L. R. 29 Mad. 365.
[2] (1901) I. L. R. 25 Mad. 553.
[3] (1901) I. L. R. 25 Mad. 7.
[4] (1905) I. L. R. 28 All. 78.
[5] (1905) I. C. L. J. 388.
[6] (1907) 5 C. L. J. 315.

1907
Gurdeo Singh
v.
Chandrikah Singh
And
Chandrikah Singh
v.
Rashbehary Singh.

Marwari v. *Bishen Pershad*[1]. It is not necessary, however, to deal with this point in detail because, as we have already held, defendants 5 to 7 are not entitled to rely upon their martgages of 1884 and 1887 as against mortgage of 1886, which the plaintiffs seek to enforce. The plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created.

The only point taken on behalf of defendants 9 to 12 raises the question, whether they are not entitled to their costs in the Court of first instance as well as in this Court. It is manifest that the case of the plaintiffs as against them has entirely failed and the learned vakil for the plaintiffs has not seriously resisted the claim for costs put forward on behalf of defendants 9 to 12.

The result, therefore, is that Appeal No. 540 of 1904 preferred by defendants 5 to 7 fails, and must be dismissed. Appeal No. 566 of 1904 preferred by the plaintiffs must be allowed, and the decree of the Subordinate Judge modified to this extent, namely, the words "subject to the prior mortgage charge of the defendants 5 to 8 and" and "the mortgage decree of the defendants Nos. 5 to 8 and" shall be expunged. The cross objection of defendants 9 to 12 must also be allowed, and they will be entitled to their costs in the Court below. So far as the costs of this Court are concerned, defendants 5 to 7 must pay the costs of the plaintiffs respondents in Appeal No. 540 of 1904, and the plaintiff appellants in Appeal No. 566 of 1904, must pay the costs of defendants 9 to 12. Only one decree will be drawn up in the two appeals, and, to avoid future difficulties, the decree must be self-contained without any reference to the decree of the Subordinate Judge.

HOLMWOOD J. I concur. *Decree modified.*

Note.—Subrogation arises only in those cases, where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor. Hence, it may be said in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and

[1] (1903) L. R. 31 I. A. 67; I. L. R. 31 Calc. 322.

1907
Gurdeo Singh
v.
Chandrikah Singh
and
Chandrikah Singh
v.
Rashbehary Singh.

hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The case of *Gokaldas* v. *Puran Mal*, L. R. 11 I. A. 126; I. L. R. 10 Calc. 1035 shows that the purchaser of an equity of redemption paying off the first charge to protect his own interest, can use the first mortgage as a shield against mesne encumbrancers. *Jagatdhar* v. *Brown*, I. L. R. 33 Calc. 1133 is a case of subrogation by agreement (conventional subrogation). The decision in *Dinobundhu* v. *Jogmaya*, L. R. 29 I A. 9; I. L. R. 29 Calc. 154 shows the line dividing the class of cases, where no bargain is made when the money is advanced, and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises.

The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. Where money is left with a subsequent vendee or mortgagee by the mortgagor for payment of the earlier mortgages, it is not open to such purchaser or mortgagee by paying off the earliest mortgage to claim priority in respect of such payment as against a mortgagee whom he was also bound to pay: *Brijnath* v. *Murlidhar*, 4 A. L. J. 349; *Dalip* v. *Birnaik*, 6 A. L. J. 549; *Muhamad Sadik* v. *Ghaus*, 7 A. L. J. 914; I. L. R. 33 All. 1011; *Har Shyam* v. *Shyam Lal*, 22 C. L. J. 227; I. L. R. 43 Calc. 69; 20 C. W. N. 601. This is so not on the ground that the purchaser pays off the earlier mortgages as an agent of the mortgagor and on his behalf, but on the ground that the very nature of the transaction shows that it was not the intention of the parties to keep the earlier mortgages intended to be paid off alive as against each other. It is quite clear that where a purchaser undertakes to pay off, say, only the earliest mortgage out of a large number, he is entitled to claim priority in respect of such payment as against mesne incumbrancers: *Gur Narain* v. *Shadi Lal*, 8 A. L. J. 1289; I. L. R. 34 All. 102. But if the purchaser with full knowledge of all the mortgages undertakes with the vendor, with the money left with him by the latter, to satisfy one or more of the later mortgages, he cannot afterwards by discharging an earlier mortgage hold that up as a shield against the mortgagees whom he had undertaken to pay. He is bound to pay them off with the money left at his disposal. When a person purchased a property which was in fact subject to three successive mortgages, but was misled to believe that there was only two, and the vendor left funds with him out of the sale consideration sufficient to discharge the two mortgages which had been disclosed to the vendee and subsequently upon discovering the existence of the third mortgage also which was as a matter of fact the earliest in point of time, paid off the amount due on the first two mortgages, it was held that he was under the circumstances entitled to priority in respect of the payment made by him to satisfy the first mortgage against the third mortgagee. *Har Shyam* v. *Shyam Lal*, 22 C.L.J. 227; I.L.R. 43 Calc. 69; 20 C.W.N. 601.

The doctrine that a stranger to a contract may sometimes be entitled to claim the benefit of the performance thereof, cannot be invoked to defeat the ends of justice: *Har Shyam* v. *Shyam Lal*, 22 C. L. J. 227.

Present :—LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, AND MR. AMEER ALI.

SHAMU PATTER . . . . APPELLANT ;

AND

1. ABDUL KADIR RAVUTHAN AND OTHERS
2. ABDUL RAJAK SAHIB AND OTHERS . . } RESPONDENTS.

[*Reported in L. R. 39 I. A. 218 ; I. L. R. 35 Mad. 607 P. C. ; 16 C. L. J. 596 P. C. ; 16 C. W. N. 1009 P. C.*]

1912 *June 19, 20 ; July 30.*

On May 30, 1899, the first two defendants executed in favour of the appellant's predecessor in title an hypothecation deed of the lands in suit to secure Rs. 10,000 and interast. In June, 1899, they created further charges thereon under deeds in which the said hypothecation deed was recited. Subsequently certain decree-holders against the said defendants attached the lands and thereafter the appellant preferred to claim under Civil Procedure Code, 1882, s. 278, on the basis of the deed in his favour, and his claim was upheld to the extent of Rs. 4,045 only.

On July 18, 1902, the appellant sued for the sale of the lands comprised in his deed, and on March 27, 1903, the attaching creditors sued for a declaration that the said deed was void against them as fraudulent and without consideration. The suits were heard together, and after evidence relating to the consideration had been completed a fresh issue was framed as to whether the deed was valid under the Transfer of Property Act, s. 59, it appearing from the evidence that the executants of the deed had only acknowledged and not actually affixed their signatures in the presence of the attesting witnesses.

The judgment of their Lordships was delivered by

MR. AMEER ALI. These are two consolidated appeals from certain judgments and decrees of the High Court of Madras, dated January 28, 1908, affirming the decisions of the Subordinate Judge of South Malabar at Palghat ; and the sole question for determination in both cases turns upon the meaning to be attached to the word "attested" in s. 59 of the Indian Transfer of Property Act (IV. of 1882), the first clause of which provides that, where the principal money secured is one hundred

rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The appellant Shamu Patter, as the representative of one Appu, deceased, brought a suit on July 18, 1902, in the Court of the Subordinate Judge of South Malabar, to enforce a mortgage alleged to have been executed in favour of Appu by the Ravuthan defendants. The other defendants to Patter's action were certain attaching creditors of the Ravuthans, who are respondents in the present appeals, and who challenge the mortgage on the ground, inter alia, that it was in fraud of creditors and without consideration. Their attachment on the mortgaged properties appears to have been partially removed at the instance of Patter, and they accordingly brought a suit some time in 1903 in the Court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration, and ineffective so far as their rights were concerned. This suit was afterwards transferred to the Court of the Subordinate Judge and was tried with Patter's action, the evidence in one being taken as evidence in the other.

The trial began, as appears from the order sheet, on September 7, 1903; arguments were heard on November 16 and 17, and judgment was reserved. On the same date, it appearing from the evidence of the witnesses to the mortgage deed that they were not present at its execution but had put their names on the document on the acknowledgment of the Ravuthans, the Subordinate Judge framed a supplemental issue in these terms: "Is it (meaning the mortgage deed) valid under s. 59 of the Transfer of Property Act?" And on November 19, holding that the document was invalid under that section, he dismissed Patter's suit (save as regards a personal decree against the Ravuthans) and by a separate judgment decreed the action of the creditors.

From these two decrees Patter appealed to the High Court of Madras, which has upheld the Lower Court's decisions.

In the present appeals the judgments of the Courts in India have been challenged on two grounds, first that the Subordinate

J. C.
1912

Shamu Patter
v.
Abdul Kadir
Ravuthan.

Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it; and secondly that the Courts are in error in holding that the word "attested" in s. 59 of the Transfer of Property Act implies the witnessing of the actual execution of a document.

With regard to the first point their Lordships are of opinion that s. 149 of the Civil Procedure Code (Act XIV of 1882), which is applicable to the proceedings, is conclusive. That section declares that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

The first part of the section leaves it in the discretion of the Court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was, therefore, fully empowered to frame the issue on which he decided the case.

Even had there been no such express provision in the Code, their Lordships consider every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties.

The substantial ground, however, on which the decrees of the High Court are impugned has reference to the interpretation put upon s. 59 of the Transfer of Property Act. It is contended on the authority of *Grayson* v. *Atkinson* [1] and *Ellis* v. *Smith* [2] which was followed in 1829 in *White* v. *Trustees of the British Museum* [3], that the learned judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it.

The construction put in those cases on the word "attested" occurring in s. 5 of 29 Car. 2, c. 3 (the Statute of Frauds), no doubt supports the contention of the appellant that attestation

[1] 2 Ves. Sen. 454.
[2] 1 Ves. 11.
[3] 6 Bing. 310.

upon the acknowledgment of the executant in equivalent to being present at and witnessing the execution. They related, however, to the due execution of wills, and though the language of Lord Hardwicke in *Grayson* v. *Atkinson* [1] was sufficiently wide to cover deeds, his interpretation has not passed without question in later cases. The eminent judges who decided *Grayson* v. *Atkinson* [1] and *Ellis* v. *Smith* [2] themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them. Parker C.B. began his judgment with the following important observation :—

"I confess, if this had been res integra, I should doubt whether the testator's declaration is a proper execution within the 5th clause ; because, I think, an admission that it is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries."

Willes C. J. observed that he was not satisfied in his own mind that the testator's acknowledgment was sufficient, but he added "authorities bear me down and I must yield." And the Master of the Rolls pronounced the extended construction to be "a dangerous determination and destructive of those barriers the statute erected against perjury and frauds." The learned judges, however, felt bound by the previous decisions, and, proceeding on the principle of stare decisis, decided in favour of the view now pressed before their Lordships regarding the construction of a section of the Indian statute relating to a totally different subject.

As the question involved in these appeals is of considerable importance and there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not desire to pass altogether unnoticed the other authorities discussed at the Bar as well as in the well-reasoned judgments of the learned judges in the Madras High Court.

In *Casement* v. *Fulton* [3], which was decided in 1845, the question for decision was whether the signatures of two witnesses

[1] 2 Ves. Sen. 454.
[2] 1 Ves. 11.
[3] 3 Moo. Ind. Ap. 395.

J. C.
1912
Shamu Patter
v.
Abdul Kadir
Ravuthan

who had subscribed a will at different times, but the first had acknowledged to the second that he had signed the same, amounted to sufficient compliance with the provisions of s. 7 of the Indian Wills Act of 1838. Lord Brougham, in delivering the judgment of the Judicial Committee, observed that: "The Statute of Frauds (29 Car. 2, c. 3, s. 5) requires the will to be signed by the testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things, as different as the witnessing a fact or act, and the witnessing a confession of that fact or act." And after referring to the hesitation with which the decision had been arrived at in *Ellis* v. *Smith*[1], he refused "to carry one step further a construction which so great a weight of authority lamented and showed to have been ill-advised in its inception."

The later cases are still more direct in the interpretation of the words "attestation" and "attested." In *Bryan* v. *White*[2], Dr. Lushington in 1850 laid down that "attest means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." In 1855 Lord Campbell C.J., in *Roberts* v. *Phillips*[3], enunciated the same rule as regards the word "attested," that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett* v. *Spilsbury*.[4] The Lord Chancellor summed up the conclusion in these words: "The party who sees the will executed is in fact a witness to it; if he subscribes as a witness he is then attesting witness."

The meaning of the words "attest" and "attestation" has also been before the Courts under the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31, ss. 8 and 14), and the interpretation put on them in *Roberts* v. *Phillips*[3], and *Bryan* v. *White*[2], has invariably been followed.

[1] 1 Ves. 11.
[2] 2 Rob. 315, 317.
[3] 4 E. & B. 450.
[4] 10 Cl. & F. 340.

J. C. 1912 Shamu Patter v. Abdul Kadir Ravuthan.

Sect. 50 of the Indian Succession Act (X. of 1865) was referred to in suport of the appellant's contention regarding the meaning of the word "attested" in s. 59 of the Transfer of Property Act. The phraseology of the two sections are quite different, as different in fact as the object of the two statutes.

Sect. 2 of Act XXV of 1838 (the Indian Wills Act) declared that, after the passing of that Act, 29 Car. 2 "shall cease to have effect" except to a limited extent within the territories of the East India Company. In s. 7 the word "attested" is left out, but it is provided that testator's signature "shall be made or acknowledged by him in the presence of two or more witnesses present at the same time." The latter words gave rise to the question in *Casement* v. *Fulton*[1]. Act X of 1865 (the Indian Succession Act) has substantially taken the place of the Indian Wills Act of 1838, and embodies the rules which constitute the law applicable in India to cases of intestate or testamentary succession, excepting as regards Mahomedans, for the major portion of this Act was made applicable to Hindus by the Hindu Wills Act. Sect. 50 provides for the due execution of what are called unprivileged wills, and paragraph 3 declares: "The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

It will be noticed that the word "attested," which was omitted in s. 7 of the Act of 1838, is reintroduced in s. 50, and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word "attested" by itself conveyed the meaning that attestation upon the acknowledgment of the executant was sufficient, there would have been no reason for making an express provision in the section. The

[1] 3 Moo. Ind. Ap. 395.

J. C.
1912
Shamu Patter
v.
Abdul Kadir
Ravuthan.

inference to be drawn from it is obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words, of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and, as the word "attest" was not sufficient to validate such attestation, introduced an express provision to that effect. Sect. 68 of the Indian Evidence Act (I. of 1872), which declares that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution," appears to their Lordships to indicate that the Indian Legislature used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. Sect. 59 of the Transfer of Property Act, in requiring that in a certain class of cases a mortgage " can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses," could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds.

The Calcutta High Court has in three cases arising under s. 59 taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon acknowledgment, in *Rann* v. *Laxmanrao* [1] the learned judges, on the authority of *Burdett* v. *Spilsbury* [2], arrived at the same conclusions as the two other Presidency High Courts. The Allahabad High Court, however, in the case of *Ganga Dei* v. *Shiam Sundar* [3] has taken a different view. The learned judges seem to consider the introduction of the words " personal acknowledgment " in s. 50 of the Indian Succession Act as an interpretation of the word " attest." They say as follows :—

* * * * * *

" It seems to us reasonable to suppose that the interpretation put upon the word ' attest ' in that section, in the absence of good technical or substantial reason to the contrary, should be

[1] I. L. R. 33 Bomb. 54.
[2] 10 Cl. & F. 340.
[3] I. L. R. 26 Allah. 69.

J. C.
1912
Shamu Patter
v.
Abdul Kadir
Ravuthan.

taken to be the meaning in which the word is used in s. 59 of the Transfer of Property Act."

With respect, their Lordships are wholly unable to follow the reasoning. As already observed, the provision as to attestation upon the testator's personal "acknowledgment" was quite a separate condition and in no sense an interpretation of the word "attest." In fact, it was provided that the witnesses might attest the document on witnessing the actual execution or on the personal acknowledgment of the testator of the execution. But that, in their Lordships' judgment, affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned judges regarding the policy of placing a larger construction on the word in consequence of the "social institutions of the country." Those very institutions their Lordships consider make it necessary that "the barriers against perjury and fraud," to use the language of the Master of the Rolls in *Ellis* v. *Smith* [1], should not be removed upon speculative considerations.

On the whole their Lordships are of opinion that the judgment of the High Court of Madras is right, and that these appeals ought to be dismissed, and they will humbly advise His Majesty accordingly.

NOTE.—In order to create a valid mortgage it must be signed by the executant, and attested by at least two witnesses. (s. 59 of the Transfer of Property Act). The party who sees the document is in fact a witness to it; if he subscribes as a witness, he is then attesting witness. Hence if the witness is not present at the execution of the instrument by the mortgagor but subscribes as a witness afterwards on the acknowledgment of the grantor, the document is not attested. *Girindra* v. *Bijoy Gopal*, I. L. R. 26 Calc. 246; *Abdul Karim* v. *Salimun*, I. L. R. 27 Calc. 190. The document is not attested, if the attesting witnesses sign it before its execution by the mortgagor. *Pran Nath* v. *Jadunath*, 9 C. W. N. 697; I. L. R. 32 Calc. 729.

Where a deed is executed by a *pardanashin* lady, if the attesting witnesses before whom the lady does not appear, but who are well acquainted with their voices, recognised their voices and through the screen saw the lady executing the deed, though they were unable to see their faces, it is properly executed. *Padarath* v. *Pandit Ram*, 19 C. W. N. 991 P. C.; 22 C. L. J. 165 P. C.; I. L. R. 37 All. 476 P. C. See also *Harmongal* v. *Ganaur*, 13 C. W. N. 40.

When a deed contains at the foot the names of three or four persons as witnesses, all of whom are illiterate, and who do not say that their marks were attached to the document at their desire, it is not validly attested. *Taki Nasya* v. *Puru Muhamad*, 2 C. L. J. 70 n.

[1] 1 Ves. 11.

Before—MR. JUSTICE RAMPINI AND MR. JUSTICE MOOKERJEE.

JADU NATH PODDAR

v.

RUP LAL PODDAR.

[*Reported in I. L. R. 33 Calc. 967 ; 4 C. L. J. 22 ; 10 C. W. N. 650*]

1906 The following judgments were delivered :

March. 22. RAMPINI J. In the suit, out of which this appeal arises, the plaintiff seeks to obtain a declaration of his right to certain property and to recover possession of it from the defendants. He had executed a deed of relinquishment in favour of the defendants, in which he alleged that in respect of that property he was the *benamidar* of the defendants, and he now sues to have it established that this deed of relinquishment was a colourable deed, which he executed to save his property from being sold in execution of decrees obtained against him by his creditors. He alleges that his intended fraud was not carried out because he won the appeals he preferred in the suits with his creditors and so he desires to get back possession of his property. The defendants traverse his allegations. The Lower Appellate Court has given the plaintiff a decree.

The defendants appeal on two grounds—(1) that the plaintiff is estopped from alleging the deed of relinquishment to be colourable and (2) that the plaintiff is not entitled to rescind a deed he executed for the purpose of perpetrating fraud.

There is clearly no estoppel in this case. The defendants were in no way misled and thereby induced to do anything or alter their position. Further, the rule laid down by this Court is that, when the intention to commit fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is *benami*. This rule has no doubt been attacked by the Madras High Court in the case of *Yaramati Krishnayya* v. *Chundra Papayya*,[1] and a different rule has been laid down by the Bombay High Court

[1] (1897) I. L. R. 20 Mad. 326.

in *Chenvirappa* v. *Puttappa*,[1] but I see no reason to dissent from the rulings of this Court on the subject. I would therefore dismiss this appeal with costs.

MOOKERJEE J. On the 29th November, 1893, the plaintiff executed a deed of relinquishment in favour of the first defendant, by which he declared that the properties in dispute in this litigation belonged to the latter. On the 14th January, 1899, the first defendant executed in favour of the second defendant a conveyance in respect of a half share of these properties, as if he was the beneficial owner entitled to deal with them. The plaintiff now seeks to recover possession upon declaration that the deed of relinquishment was not intended to and did not confer any valid title upon the first defendant, and that consequently the second defendant did not acquire any rights under his purchase. It has been found as a fact that the second defendant is not a *bonâ fide* purchaser for value without notice, and that at the time he made his purchase, the first defendant was not competent to deal with the properties. The accuracy of this finding has not been challenged before this Court. The defendants, however, contended in the Courts below, and they have repeated the objection in this Court, that the plaintiff is not entitled to any relief because at the time when he executed the deed of relinquishment, he did it for the express purpose of defrauding his creditors. The plaintiff admits that shortly before the deed was executed, some persons, who alleged themselves to be his creditors, had obtained decrees against him, against which he preferred appeals. He apprehended that during the pendency of the appeals, the decree-holders might take out execution, and with a view to protect his properties he executed this deed of relinquishment as a shield against those creditors. As a matter of fact, no execution was ever taken out, and the appeals instituted by the plaintiff were ultimately successful, with the result that the alleged claims of the creditors were held to be unfounded and were dismissed. Under these circumstances, the plaintiff contended that his conduct was not such as to preclude him from establishing the truth and recovering possession of the properties. The Courts below have concurrently adopted this view of the matter and have given the plaintiff a decree for possession. The

[1] (1887) I. L. R. 11 Bom. 708.

1906
Jadu Nath Poddar
v.
Rup Lal Poddar.

defendants have appealed to this Court, and on their behalf it has been contended that as the plaintiff executed the deed of relinquishment in order to defraud his creditors, he has no standing in a Court of Equity, which will not extend relief to a fra dulent grantor. In support of this proposition, reliance has been placed upon the cases of *Chenrirappa* v. *Puttappo* [1], *Rangammal* v. *Venkatachari* [2] and *Yaramati Krishnayya* v. *Chundru Papayya* [3]. The learned vakil for the appellant has further argued that the contrary view taken in the case of *Sham Lall Mitra* v. *Amarendra Nath Bose* [4], where it was held that it is open to a party to show that a document executed, but not carried into effect, is colourable, was not necessary for the purposes of that decision and cannot be supported upon the authorities. The learned vakil has invited us to refer the question raised to a Full Bench for decision. There can be no doubt that there has been considerable diversity of judicial opinion upon the matter, and it is necessary, therefore, to examine the various authorities and the principles upon which they are founded.

One of the earliest cases in these provinces in which the question was raised as to how far the grantor of a fraudulent deed is entitled to ask a Court to relieve him of its consequences is that of *Ram Indur Deo Rai* v. *Roop Narain Ghose.* [5] In that case *A*, who was indebted to *B*, executed a mortgage in his favour, but with a view to defraud other creditors antedated it by eight years. *A* further gave a warrant of attorney to *B* to enable *B* to confess judgment on behalf of *A* in a suit by *B* to enforce the security as against *A*. The mortgage was intended to be fictitious and was granted with a view to screen the property from the creditors of *A*. *B* also executed an engagement in favour of *A*, which recited the true nature of the whole transaction. Subsequently, *B* sued upon the mortgage, obtained a decree upon confession of judgment, had the property put up to auction, purchased it himself and instead of holding as trustee for *A*, later on conveyed it to a stranger. *A* sued to recover the property. The Sudder Court dismissed the suit upon two

[1] (1887) I. L. R. 11 Bom. 708.
[2] (1895) I. L. R. 18 Mad. 378; affirmed on appeal (1896) I. L. R. 20 Mad. 323.
[3] (1897) I. L. R. 20 Mad. 326.
[4] (1895) I. L. R. 23 Calc. 460.
[5] (1814) 2 Sel. Rep. 118; New Ed. 149.

1906

Jadu Nath Poddar v. Rup Lal Poddar.

grounds—*first*, that the plaintiff could not recover the property from a *bonâ fide* purchaser for value without notice, and, *secondly*, that the plaintiff could not ask to be relieved of the consequences of his own fraudulent act. With regard to this second ground, the Court observed that it is a general principle of law that a man entering into a fraudulent agreement with another of this nature to defeat the rights of third parties, creditors for instance, shall not, himself or his representatives, be relieved against the consequences of his own fraudulent act, though the creditors may, and if his partner in the fraud takes advantage, ever so dishonestly, of the power, which has been put into his hands, a Court of Justice will not interfere on behalf of him or his heirs. With regard to this case, two points deserve attention, namely, *first*, that apparently the fraudulent object in view was not carried out, and, *secondly*, that if the plaintiff had been allowed to recover the property, either the first transferee from him would have lost the sum justly payable to him or the second transferee, who had taken without notice of the secret agreement, would have lost his money.

A similar question was raised in *Roushun Khatoon* v. *Collector of Mymensingh.*[1] *A* sued to recover property from *B*, which had been conveyed to him under a secret engagement that he was to hold it for the benefit of *A*. The Sudder Court dismissed the suit on the ground that the sale, though nominal, was effected by a deed duly drawn out, attested and registered, possession given by mutation in the Revenue Registers, and all this done to deceive the public and to evade a rightful process of law. The decision was rested on the ground that no person can take advantage of his own wrong. It may be observed that the suit was resisted not only by *B*, but also by persons, who had purchased at a sale held by the Collector, to whom *B* had given the property as a security for due payment of the Government revenue.

In the case of *Brikmo Mye Dibeea* v. *Ram Dolab Hor*,[2] the cases just referred to were followed. *A* transferred properties to *B* with a view to save them from the claim of his creditors. The creditors took out execution, attached the properties and were successfully met with a claim by the transferee. *A* then sued to recover the property from *B*, and a purchaser claiming under

[1] (1846) Beng. S. D. A. 120.

[2] (1849) Beng. S. D. A. 276.

1906
Jadunath Poddar
v.
Rup Lal Poddar.

him. A Full Bench of the Sudder Court held that the Court will never sanction or in any way give the aid of its authority to a party who, by his own admission, founds his claim upon fraudulent agreements contrived in order to defeat the ends of justice. It may be remarked that the fraud intended to injure the rights of the creditors had been successfully accomplished, and also that the transferee from B claimed to be a *bonâ fide* purchaser for value without notice.

In the case of *Rajnarain Roy* v. *Jugunnath Pershad Mullick* [1], *A* sued to recover property, to which he claimed title by purchase from *X*. It was found that *B* was the real owner of the property, and had executed a conveyance in favour of *X*, complete in form, but nominal in intention and effect, with a view to escape the pressure of the claims of his creditors. The Sudder Court held that *A* was entitled to succeed, and ovserved that a party having made a transfer in fraud cannot reclaim property from the transferee upon tender of proof that the documents were not *bonâ fide* or sue to treat the acts of the transferee as null and void. It will be observed that the plaintiff was a *bonâ fide* purchaser for value from *X*, and on that ground alone was entitled to succeed; at the same time, there was nothing to show that the fraud contemplated had been carried into effect.

In the case of *Koonjee Singh* v. *Jankee Singh* [2], *A* sued to recover property, which was alleged to have been purchased by him in the name of *B*, with a view to save it from his creditors. The majority of the learned Judges held that the suit was not maintainable as the claim was founded on a deed drawn out *benami* in order to deceive creditors. The dissentient Judge however, held that as the contemplated fraud had not been carried out, the plaintiff was entitled to succeed, and he pointed out that, if the suit was decreed, instead of creditors of the plaintiff being defrauded, they must be benefited, because if the property be declared to belong to plaintiff, his creditors may take it in satisfaction of their claim. I may point out that the view thus indicated accords with the opinion of the Supreme Court of the United States in *Black* v. *Darling* [3], namely, that in an action to recover money deposited with the defendant, it is no

[1] (1851) Beng. S. D. A. 774.
[2] (1852) Beng. S. D. A. 838.
[3] (1890) 140 U. S. 239.

valid defence to urge that the plaintiff made the deposit with the intent to cheat and defraud his own creditors, because, as soon as the plaintiff recovers, his creditors are likely to be benefited by the money.

In *Bhowanny Sunkur Pandey* v. *Purem Bebee* [1] the Sudder Court ruled upon the authority of the cases of *Ram Indur* v. *Roop Narain* [2] and *Brikmo Mye* v. *Ram Dulab* [3] that no relief will be given to a party suing for the purpose of setting aside a *benami* sale, avowedly made with the fraudulent intention of defeating the rights of a third party, who had a claim against the property. The report does not show whether the plaintiffs had succeeded in the scheme which had been planned with a view to enable them to evade payment of their just debts.

In the case of *Ram Soonder Sandial* v. *Annud Nath Roy* [4], the Sudder Court held, following the decision in *Rajnarain* v. *Jugunnath Pershad* [5] that a plaintiff was entitled to succeed as against a defendant, who admitted that he had made a fictitious transfer in favour of the plaintiff with a view to evade payment to his own creditors. It will be observed that in this case the plaintiffs were allowed to succeed, although it was found that they were not the beneficial owners and were cognisant of all the particulars connected with the scheme for defrauding the creditors. There was nothing to show that the intended fraud had been actually practised against the creditors, and yet the Court held that the ostensible transfer could not be legally disputed. Substantially the same view was taken in *Ram Lal* v. *Kishan Chunder* [6]. These cases, however, are inconsistent with the earlier decision of the Sudder Court in *Birj Mohun Sein* v. *Ram Narsingh Rai* [7], where the defendants, who had collusively created a fictitious taluk in favour of the plaintiffs in order to evade their liability under a decree passed against them in another suit, were allowed to plead and successfully, their previous collusion in answer to the unfounded claim of the plaintiffs.

A view similar to the one taken in the last case was adopted by the Sudder Court in *Obhoy Churn Ghuttuck* v. *Treelochun*

[1] (1853) Beng. S. D. A. 639.
[2] (1814) 2 Sel. Rep. 118; New Ed. 149.
[3] (1849) Beng. S. D. A. 276.
[4] (1856) Beng. S. D. A. 542.
[5] (1851) Beng. S. D. A. 774.
[6] (1860) Beng. S. D. A. Vol. I. 436.
[7] (1829) 4 Sel. Rep. 241; New Ed. 435.

1906
Jadu Nath Poddar
v.
Rup Lal Poddar.

Chatterjee.[1] It was ruled upon the authority of *Roberts* v. *Roberts*[2] and *Montefiori* v. *Montefiori*[3] that, although a deed may be avoided on the ground of fraud, the objection must come from a person neither party nor privy to it, for no man can allege his own fraud to invalidate his own deed. The defendant admitted in answer to the claim that they had executed a deed of sale in favour of the plaintiffs, but pleaded that it was purely fictitious transaction resorted to for the purpose of defeating the claims of parties, who held decrees against the vendors. It was contended that, as the persons through whom the plaintiffs derived title were in *pari delicto* with the defendants, the latter should not be debarred from pleading the fictitious nature of the transaction. The Sudder Court held that a plea of this description could not be heard in a Court of Justice, and observed that it was well that it should be understood that, when people execute fictitious deeds for the purpose of defeating their creditors, avoiding an attachment, or effecting any other fraudulent purpose, they place themselves completely at the mercy of the person in whose name the fictitious conveyance is made out, and that their plea of the transaction being a *benami* one will not be listened to. This case therefore proceeded upon the doctrine laid down by Lord Mansfield in *Montefiori* v. *Montefiori*[3] that it was immaterial whether the fraud is alleged as a matter of defence or as a ground of action, because "no man shall set up his own iniquity as a defence, any more than a cause of action."

The cases analysed above are based on the doctrine that, where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud, but asks to have his act undone, the Court would refuse relief and would leave the parties to the consequence of their misconduct, dismissing the claim, when the suit was brought by the real owner to get back possession of his property and refusing to listen to the defence, when he set it up in opposition to the person whom he had invested with the legal title. The rule thus stated was subsequently adopted in the cases of *Harry Sunker Mookerjee* v. *Kali*

[1] (1859) Beng. S. D. A. 1639. [2] (1819) 2 B. and Ald. 367; 20 R.R. 477.
[3] (1762) 1 W. Bl. 363.

1906
Jadu Nath Poddar
v.
Rup Lal Poddar.

Coomar Mookerjee[1], *Alok Soondry Goopto* v. *Horo Lal Ray*[2] and *Keshub Chunder Sein* v. *Vyasmonee*.[3] In some of these cases, no doubt, the fraudulent object had been carried into effect, while in others the attempt had failed; but it was expressly stated in *Hurry Sunker Mookerjee* v. *Kali Coomar Mookerjee*[1] that it was immaterial whether any creditors of the transferor were actually defrauded, and in *Alok Soondry Goopto* v. *Horo Lal Roy*[2] Jackson J., with the concurrence of Sir Barnes Peacock C. J., observed that, as Courts of Justice are designed for the protection of honest suitors and the enforcement of just claims, they are not available as machinery to aid the carrying out of schemes of fraud. This view might seem to receive some apparent support from the observations of the Judicial Committee in *Azimut* v. *Hurdwaree*[4], *Sookheemonee Dassee* v. *Mohendro Nath Dutt*[5], and *Ramanugra* v. *Mahasunder*.[6] In none of these cases, however, did the question arise directly for consideration, nor was it actually decided. It may be added that the Courts went so far as to hold that the rule was applicable not only to the parties to the transaction, but also to persons, who take under the real owner, whether as heirs or purchasers; see *Luckhee Narain Chuckerbutty* v. *Taramonee Dossee*[7], *Furreedoonissa* v. *Ruhomut*[8], *Garib Hassain* v. *Asimunnissa*[9], *Purikheet Sahoo* v. *Radha Kishen Sahoo*[10] and *Kalee Nath Kur* v. *Doyal Kristo Deb*.[11] In the case last mentioned, however, Sir Charles Hobhouse J. expressed considerable doubt as to the correctness of the view, and assented to it on the ground that it was supported by a considerable body of authorities and might be regarded as desirable in the circumstances of this country.

About this time the Judicial Committee decided the case of *Ram Surun Singh* v. *Mussumat Pranpearee*[1], in which it was held that, where in a suit two of the defendants in their answer made a statement in respect of an alleged mortgage transaction

[1] (1864) W. R. Gap. 265.
[2] (1866) 6 W. R. 287.
[3] (1867) 7 W. R. 118.
[4] (1870) 13 M. I. A. 395, 402; 14 W. R. P. C. 14.
[5] (1869) 13 W. R. P. C. 14; 4 B. L. R. P. C. 16.
[6] (1873) 12 B. L. R. 433.
[7] (1865) 3 W. R. 92.
[8] (1865) 4 W. R. 37.
[9] (1862) Hay. 528.
[10] (1865) 3 W. R. 221.
[11] (1870) 13 W. R. 87.
[12] (1870) 13 M. I. A. 551; 15 W. R. P. C. 14.

1906

Jadu Nath Poddar v. Rup Lal Poddar.

with the object of defeating the unfounded claim of the plaintiff, it was open to either of these two persons in a subsequent litigation, in which they were arrayed as plaintiff and defendant, to plead that the statement in the joint answer in the former suit was false and intended as a fraud on the third party. Lord Justice James observed in delivering the judgment of their Lordships that it is open to a mortgagor to deny that the money the receipt of which is formally acknowledged under his hand and seal was actually advanced, and that he could do so notwithstanding that he made a contrary statement in a previous litigation with a third party; for a pleading by two defendants against the suit of another plaintiff can never amount to an estoppel as between them. A similar principle was adopted by the Judicial Committee in the case of *Mussumat Ooley Koowur* v. *Mussumat Ladoo*[1]. These decisions were relied upon by Sir Richard Couch C. J. in *Sreemutty Debia Chowdhurain* v. *Bimola Soonduree Debia*[2] as establishing that, even where the object of a *benami* transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the *benami*, and that in truth it still remained with the person, who professed to part with it. The same view was also taken in the cases of *Phool Bibee* v. *Goor Surun Doss*[3], *Sreenath Roy* v. *Bindoobasinee Debia*[4], *Gopeenath Naik* v. *Jadoo Ghose*[5], *Byknut Nath Sen* v. *Goboollah Sikdar*[6] and *Mukim Mullick* v. *Ramjan Sirdar*[7]. Later on, many of the authorities on the subject were reviewed in *Shamlall Mitra* v. *Amarendra Nath Bose*[8], and the learned Judges, while approving of the rule laid down by Sir Richard Couch in *Sreemutty Debia Chowdhurain* v. *Bimola Soonduree Debia*[2], indicated that there might be substantial distinction between cases in which the fraud had been carried into execution and cases in which the contemplated fraud had not gone beyond the stage of intention. This distinction was subsequently adopted as well founded in the cases of *Kali Charan Pal* v. *Rasik Lal Pal*.[9]

[1] (1870) 13 M. I. A. 585; 15 W. R. P. C. 16; 6 B. L. R. 283.
[2] (1874) 21 W. R. 422.
[3] (1872) 18 W. R. 485.
[4] (1873) 20 W. R. 112.
[5] (1874) 23 W. R. 42.
[6] (1875) 24 W. R. 391.
[7] (1881) 9 C. L. R. 64.
[8] (1895) I. L. R. 23 Calc. 460.
[9] (1894) I. L. R. 23 Calc. 902 (note).

1906

Jadu Nath Poddar v. Rup Lal Poddar.

Goberdhan Singh v. *Ritu Roy*[1], *Banka Behary Dass* v. *Raj Kumar Dass*[2], and *Govinda Kuar* v. *Lala Kishun Prasad*[3]. It is clear, therefore, that, although in the earliest cases, a very stringent rule was laid down to the effect that a person is not entitled to ask a Court of Justice to afford him relief from the consequences of his own misconduct, the later cases enunciate a more lenient rule that the real nature of the transaction ought to guide the Court in determining the real rights of the parties. Upon this rule has been engrafted the distinction that, although where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality, which he has once cast off, in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another, whose retention of it is an act of gross fraud. In my opinion, this rule is eminently just and ought to be adopted as based on sound equitable doctrine. It is obvious that, where the fraudulent purpose has actually been accomplished by means of the colourable grant, the maxim applies—"*In pari delicto, potior est conditio possidentis.*" But where the fraud has not been accomplished, can this maxim be legitimately applied? *A* makes a fictitious grant to *B* with a view to defraud his creditor *C*, but the creditor is not actually defrauded. So far as the transaction itself is concerned, the parties no doubt stand in the same portion; *A* had a fraudulent intention and *B* was willing to aid him in carrying that intention into effect. But if the intention is not carried out and *B* dishonestly sets up a title to the property, his guilt is obviously greater than that of *A*, and I cannot appreciate upon what ground the Courts can refuse to afford relief to *A* as against *B*, whose roguery, as has been well said, is even more complicated than that of *A*. To refuse relief in such a case would be to encourage a double fraud on the one side (*B*) to punish the single fraud on the other (*A*): *Gowan* v. *Gowan*[4]. It further appears to be clear that, if we adopt this view and hold that fraudulent intention is the sole determining element, irrespective of the question whether or not that intention has been accomplished, the result would be that the grantor would be punished, even though he

[1] (1896) I. L. R. 23 Calc. 962.
[2] (1899) I. L. R. 27 Calc. 231.
[3] (1900) I. L. R. 28 Calc. 370.
[4] (1860) 30 Mo. 476.

1906
Jadu Nath Poddar
v.
Rup Lal Poddar.

abandoned his fraudulent purpose. I am aware of no case where the theory, which underlies the rule in its most stringent form, has been more vigorously explained than in *Church v. Muir*[1], where Chief Justice Beasley observed as follows:—"A contract, the purpose of which is to protect the debtor against the just claims of creditors, is an immoral act. Such an affair is inimical to social policy. In their essence and in their effects such contracts are as immoral, as pernicious, as many of those which the law has declared to be utterly void. In these respects, how are they to be distinguished from contracts, which have been so often judicially condemned, not on account of any enormous immorality, but on the score of their inconsistency with public interest and good government. They are hostile to fair dealing and commercial honesty, and on this account should be subjected to the bar of outlawry." This condemnation of fraudulent conveyances may be conceded to be just, but it seems to me that the consequences may be easily carried too far. In my opinion, mere intention, not carried into effect, ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights; and if he either abandons his fraudulent purpose before it is accomplished, or pays his debts to the full value of the property conveyed, the fraud should be regarded as purged; see *Carll v. Emery*[2] and *Drinkwater v. Drinkwater*[3], in the former of which cases Davens J., in delivering the judgment of the Supreme Court of Massachusetts, observed as follows:—

"It would seem equally clear that, when a party, who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction, by reason of such participation should be able to hold the property, the possession of which he had so acquired and thus prevent it from being devoted to its legitimate uses."

If we apply these principles to the case now before us, the inference is irresistible that the plaintiff ought to succeed. At the time when the plaintiff executed the deed of relinquishment,

[1] (1869) 33 N. J. Law. 319. [2] (1888) 148 Mass. 32; 18 N. E. Rep. 574.
[3] (1808) 4 Mass. 354.

1906 Jadu Nath Poddar v. Rup Lal Poddar.

he apprehended trouble from creditors, who had obtained decrees against him. These decrees, as I have already stated, were subsequently reversed, and it was established that the claims, which they had set up were unfounded. Upon what principle can it be maintained that the plaintiff was guilty of fraud, which disentitles him to protection from a Court of Equity? I am fortified in the view I take by the reasoning contained in the decision in the case of *Baker* v. *Gutman*[1]. *A* sued *B* for slander. *B* to protect himself conveyed property to *C*, who agreed to reconvey; *B* defeated the slander suit. Subsequenty *C* betrayed the trust, and refused to give back the property. The Supreme Court of New York held that *C* must reconvey. Johnson J. observed that as the plaintiff in the slander suit was ultimately defeated, he had no lawful claim as a creditor, and the conveyance could in no sense be said to be fraudulent, because it was made to hinder a person, who had preferred a claim which had no foundation in law or justice and the verity of which was not established by a judgment of a competent Court. To extend the operation of the rule to a case of this description does not appear to me to be defensible upon any intelligible ground either of law or of public policy. The learned vakil for the defendants-appellants strenuously contended that the view taken by Sir Richard Couch in *Sreemutty Debia* v. *Bimola Soonduree Debia*[2] is based upon the decision in *Symes* v. *Hughes*[3] which, as well as the case of *Taylor* v. *Bowers*[4], has been doubted by Fry L. J. in *Kearley* v. *Thomson*[5]. He also referred to a passage from Kerr on Fraud and Mistake, third edition, 405, in which the learned author questions the soundness of the distinction taken between cases, where a deed executed or a conveyance made has performed its office and cases where the deed or conveyance has not been used for the purpose for which it was executed. With all respect for the learned author, I am unable to adopt his criticism as sound in principle, and there is undoubtedly high authority in support of the contrary view. Thus in *Birch* v. *Blagrave*[6] a person was allowed to recover property, which had been assigned away in order to avoid service in the office of a Sheriff, when it was found that

[1] (1868) 52 Barbour (N. Y.) 36.
[2] (1874) 21 W. R. 422.
[3] (1870) L. R. 9 Eq. 475.
[4] (1876) 1 Q. B. D. 291.
[5] (1890) 24 Q. B. D. 742.
[6] (1755) Amb. 264; 27 Eng. Rep. 176.

1906
Jadu Nath Poddar
v.
Rup Lal Poddar.

he was excused service not because he actually pleaded that he had no property in the country, but because he ultimately paid the fine. Lord Hardwicke drew a distnict on between a case in which the unlawful intention had been carried into execution and a case in which no fraud was actually committed. The same distinction is supported by the cases of *Cottington* v. *Fletcher*[1], *Young* v. *Peachey*[2], *Platamone* v. *Staple*[3], and was recognised in *In re Great Berlin Steam Boat Co.*[4] and in the observation of Lord Westbury in *Tennent* v. *Tennent*[5]. In *Cecil* v. *Butcher*[6], Sir Thomas Plumer M. R. reviewed the earlier authorities, and concluded that the fact that the deed had not been acted upon and the illegal object had not been carried into execution was an element to be taken into consideration. To the same effect are the cases of *Davies* v. *Otty*[7] and *Manning* v. *Gill*[8] in which persons were allowed to recover property, which they had alienated, in order to avoid the effects of conviction for a felony, which the grantors supposed they had committed, but which they had not and could not have committed.

It is manifest, therefore, that there is a considerable body of authorities in favour of the view indicated in *Symes* v. *Hughes*[9] upon which Sir Richard Couch relied, namely, that "where the purpose for which the assignment was made is not carried into execution and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee, who has given no consideration for it." There is ample authority that in such cases equity will not permit the assignee to work a fraud and retain the property himself by setting up the Statute of Frauds as a defence. [*Haigh* v. *Kaye*[10], *Lincoln* v. *Wright*[11], and *Childers* v. *Childers*[12].] I may further observe that the distinction between the effect of fraud merely intended and a fraudulent purpose actually accomplished has been recognised by

[1] (1740) 2 Atk. 156; 26 Eng. Rep. 498.
[2] (1741) 2 Atk. 254; 26 Eng. Rep. 557.
[3] (1815) G. Coop. 250; 35 Eng. Rep. 548.
[4] (1884) 26 Ch. D. 616.
[5] (1870) L. R. 2 H. L. Sc. 9.
[6] (1821) 2 J. and W. 564; 22 R.R. 213.
[7] (1865) 35 Beav. 208.
[8] (1872) L. R. 13. Eq. 485.
[9] (1870) L. R. 9. Eq. 475.
[10] (1872) L. R. 7 Ch. 469.
[11] (1859) 4 De G. and J. 16.
[12] (1857) 1 De G. and J. 482.

1906

Jadu Nath Poddar v. Rup Lal Poddar.

the Indian Legislature in the Indian Trusts Act (II of 1882), section 84 of which provides as follows:— "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

As pointed out in Story on Equity Jurisprudence, vol. I, section 298, the test is whether the parties are truly *in pari delicto*, and it appears to me that, when the fraudulent intention has not been carried into effect and the nominal transferee dishonestly sets up a title for himself, the parties cannot rightly be regarded as *in pari delicto*. I am not unmindful that the contrary view has been maintained by eminent Judges; see for instance *Bateman* v. *Ramsay*[1], *Hamilton* v. *Ball*[2] and *McCurdy* v. *Martin*[3]; but for the reasons I have already stated, I am unable to adopt the view laid down in those cases. I may add that this view was adopted by the Allahabad High Court in *Param Singh* v. *Lalji Mal*[4] which perhaps goes too far, and by the Bombay High Court in *Hanapa* v. *Narsapa*[5] and *Babaji* v. *Krishna*[6], the last mentioned of which cases was followed by this Court in *Preonath Koer* v. *Kazi Mahomed Shazid*[7]. I am not satisfied that the Madras High Court did really take a different view in the cases of *Rangammal* v. *Venkatachari*[8] and *Yaramati Krishnayya* v. *Chundru Papayya*[9]. Upon a careful examination of the judgments in *Chenvirappa* v. *Puttappa*[10], *Rangammal* v. *Venkatachari*[8] and *Yaramati* v. *Chundru*[9], I am rather inclined to hold that they dissent only from the rule laid down by Sir Richard Couch in somewhat broad and unqualified terms in *Sreemutty Debia Chowdhurain* v. *Bimola Soonduree Debia*[11], but are really in harmony with the principles embodied in *Goberdhan Singh* v. *Ritu Roy*[12], and *Banka Behary Dass* v. *Rajkumar*

[1] (1837) Sausse & Scully 459.
[2] (1839) 2 Ir. Eq. Rep. 191.
[3] (1842) 5 Ir. Eq. Rep. 515.
[4] (1877) I. L. R. 1 All. 403.
[5] (1898) I. L. R. 23 Bom. 406.
[6] (1893) I. L. R. 18 Bom. 372.
[7] (1903) 8 C. W. N. 620.
[8] (1896) I. L. R. 20 Mad. 323.
[9] (1897) I. L. R. 20 Mad. 326.
[10] (1887) I. L. R. 11 Bom. 708.
[11] (1874) 21 W. R. 422.
[12] (1896) I. L. R. 23 Calc. 962.

1906

Jadu Nath Poddar v. Rup Lal Poddar.

Dass[1]. If, however, the learned Judges intended to affirm a rule inconsistent with the decisions last mentioned, I regret I am unable to adopt such view. With all respect I am unable to see how the view taken by this Court enables a party to a dishonest trick, by which his creditors may have been defrauded, to get himself reinstated, when his purpose has been served. On the other hand, it seems to me that, if the Court refuses to aid a plaintiff, who has made a fictitious transfer of his property from an improper motive, but has not carried into effect his intention, the Court really becomes an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff. I fail to appreciate how in such an event a Court of Equity can rightly hold that the plaintiff must suffer, because he had an improper motive, though no one has suffered by reason thereof and the conduct of the defendant is beyond question unconscionable; see *Lobo* v. *Brito.*[2]

There is another aspect of the case before me, which calls for notice. The plaintiff did not execute a conveyance in favour of the defendant, but gave him a deed of relinquishment. Now it is well settled that title to land cannot pass by admission, when the Statute requires a deed; see *Waldron* v. *Harvey*[3] and *McNeelly* v. *S. R. O. Coy*[4]. It is obvious therefore that the mere execution of the deed of release did not create any title in the defendant. No doubt under certain circumstances the plaintiff might be estopped from setting up a title in himself; but as the nominal transferee and the purchaser from him were both aware of the true nature of the deed of relinquishment they cannot set up a title by estoppel. How has then the title, which was vested in the plaintiff, passed away from him? The deed of relinquishment does not operate as a conveyance or even as a contract to convey the interest of the plaintiff nor does it operate by way of estoppel. As observed by their Lordships of the Judicial Committee in *Mussumat Oodey Koowur* v. *Mussumat Ladoo*[5] there is no other way, in which, it can

[1] (1899) I. L. R. 27 Calc. 231.

[2] (1897) I. L. R. 21 Mad. 231.

[3] (1904) 102 Am. St. Rep. 959.

[4] (1903) 62 L. R. A. 562.

[5] (1870) 13 M. I. A. 585; 15 W. R. P. C. 16; 6 B. L. R. 283.

1906

Jadu Nath Poddar
v.
Rup Lal Poddar.

operate. I must hold accordingly that the plaintiff has still an enforceable title and there is nothing to prevent him from recovering the property in suit.

The result, therefore, is that the decree made by the Courts below must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

NOTE.—To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. *Akhil* v. *Manmatha*, 18 C. L. J. 616 (619-20); 18 C. W. N. 1331. This principle is applicable where the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme. *Rajab Ali* v. *Hedayet Ali*, 19 C. W. N. 1151; 22 C. L. J. 197. Where the purpose of the transfer is not carried out, the transferor is not estopped from relying upon the *benami* nature of the transaction in a suit for specific performance of a contract to sell entered into by the transferee with a third person. *Munisami* v. *Subbarayar*, I. L. R. 31 Mad. 97; 18 M. L. J. 151. The equitable doctrine of part performance can be invoked by a stranger to the contract. *See Khagendra* v. *Sonatan*, 20 C. W. N. 149.

Where by a deed, the executant renounces a claim but conveys no title, the deed is a release. A release does not operate as a conveyance. It can, at most be taken as an admission by the releasor that he has no interest in the land. *Narak Lall* v. *Magoo Lall*, 22 C. L. J. 380; *Khagendra* v. *Sonatan*, 20 C. W. N. 149. A document whereby a *benami* purchaser at a Court auction renounces his claim to the property purchased without conveying any title thereto is a release. *Ramaswami* v. *Venkappaier*, 3 L. W. 233.

Present : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

PETHERPERMAL CHETTY.

v.

MUNIANDY SERVAI.

[*Reported in I. L. R. 35 Calc. 551 P. C.; L. R. 35 I. A. 98; 7 C. L. J. 528 P. C.; 12 C. W. N. 562 P. C.*].

1908
Feb. 5.
March 18.

One Muniandy Maistry was the owner of a grant known as the Tankkyan grant. He died on 3rd October, 1890, leaving as his next heir his mother Sigappa, to whom letters of administration to his estate were granted by the Court of the Recorder of Rangoon. She died on 1st December, 1893, and on her death, the next heirs to the estate of Muniandy Maistry were his cousins, Chellum Servai and Muniandy Servai, who were brothers and members of a joint undivided family; and letters of administration of the estate of Muniandy Maistry were granted to Chellum Servai. Muniandy Maistry had during 1888 and 1889 borrowed several sums of money from one Stumpp, and had deposited with him the title deeds of the Tankkyan grant as security for the repayment of the debt.

On 28th November, 1891 Stumpp assigned this debt to one Arunachellam Chetty, who, on 18th September, 1895, instituted, in the Court of the District Judge of Hanthawaddy, a suit to recover the amount due (Rs. 14,568-12) by sale of the grant. Chellum Servai had, in the meantime, on 11th June, 1895, executed a deed purporting to be a sale of the grant to one T. P. Petherpermal Chetty (the uncle of the appellant) for a consideration stated to be Rs. 30,000 for the grant and four years' arrears of rent due from the tenants. In answer to Arunachellam Chetty's suit, it was pleaded that the sale to Petherpermal Chetty, who had no notice of the equitable mortgage, gave him a title free of the incumbrance.

On 3rd January 1896 the District Judge gave Arunachellam Chetty a decree for sale on the ground that on the evidence in the suit Petherpermal Chetty, at the time of the execution of the deed of 11th June, 1895, had full notice of the equitable mortgage: and that decree was affirmed on appeal by the commissioner of

1908

Petherpermal Chetty v. Muniandy Servai.

Pegu on 28th March, 1896, and by the Judicial Commissioner of Lower Burma on 23rd November, 1896, both the Appellate Courts in their judgments expressing doubts as to the *bona fides* of the deed of sale.

Chellum Servai died on 15th June, 1896, and on his death Muniandy Servai (the plaintiff in the suit out of which the present appeal arose) became entitled to the estate. He was at that time in Madras and did not return to Burma, until about six months later. Petherpermal Chetty then asserted an absolute title in himself to the Tankkyan grant. On 4th June, 1897 Muniandy Servai applied for letters of administration to such portion of the estate of Muniandy Maistry as was unadministered. In his application he challenged the title of Petherpermal Chetty, who opposed the application; and by order dated 15th July, 1897, Muniandy Servai was referred to the Civil Court to establish his title. After giving instructions for the institution of a civil suit, he was induced to refer the dispute to the arbitration of a *punchayet* of certain elders of his class, who decided in favour of Muniandy Servai; and Petherpermal Chetty agreed to restore possession of the grant and render accounts. Muniandy Servai wished to return at once to Madras, so Rs. 1,000 was paid to him on account, and the actual delivery of possession and settlement of accounts was postponed, until he returned. He left Rangoon on 30th July, 1897, and early in the morning of that day executed a document at the house of one Maung Shwe Waing. This document purported to be a release of all claims, but at the time of the execution was fraudulently represented by Petherpermal Chetty to be a record of the arrangement for restoring the property and rendering accounts.

Muniandy Servai returned to Burma about a year afterwards, when Petherpermal Chetty declined to give up possession, and set up the document of 30th July, 1897 as a release.

Muniandy Servai thereupon, on 24th July, 1901, brought the present suit, claiming possession of the Tankkyan grant, and alleging that the deed of sale of 11th June, 1895 was a *benami* transaction and not intended to be operative; and that the deed of releas: dated 30th July, 1897 had been fraudulently obtained from him. The defendants were Petherpermal Chetty and two

1908
Petherpermal Chetty v. Muniandy Servai.

persons, Muthia Chetty and Chinnia Chetty, to whom he had mortgaged the grant, who were made *pro formâ* defendants; but no question arose on the present appeal as to their rights.

The defence was a denial of the plaintiff's allegations; and it was also pleaded that the plaintiff had no right to use.

The judgment of their Lordships was delivered by—

LORD ATKINSON. In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the appellant (hereinafter called "Petherpermal the elder"), and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy district, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12.

On the 11th June, 1895, Chellum Servai executed a deed puporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September, 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry, deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12 with interest, and other relief.

1908

Petherpermal Chetty v. Muniandy Servai.

Petherpermal the elder filed his defence, and the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan, he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June, 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation, which he successfully prosecuted, and, if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July, 1897, R. Muniandy Servai and Petherpermal the elder, executed a deed of release, by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case that the deed of the 11th June, 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

1908
Petherpermal Chetty v. Muniandy Servai.

It was not pressed in argument by Counsel on behalf of the appellant that on an issue of fact such as this, the finding of the Judge, who tried the case and saw the witnesses, approved, as it was, upon appeal, should, under the circumstances of the case be disturbed.

The only questions, therefore, for their Lordships' decision are :—

(1) Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

(2) Is his right of action barred by the 91st Article of Schedule II, to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th Ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus :—

"446. . . . . . . Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality, which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance persons have been allowed to recover property, which they had assigned away. . . . . where they had intended to defraud creditors, who, in fact, were never injured . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies: *In pari delicto potior est conditio possidentis.* The Court will help neither party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if

1908 Petherpermal Chetty v. Muniandy Servai.

the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced, if debtors, who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property, into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant, who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers*[1], and the authorities upon which that decision is based, clearly establish this. *Symes* v. *Hughes*[2] and *In Great Berlin Steamboat Co.*[3] are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry L.J., in *Kearley* v. *Thomson*. [4]

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many

[1] (1876) L. R. 1 Q. B. D. 291.
[2] (1870) L. R. 9 Eq. 475, 479.
[3] (1884) L. R. 26 Ch. D. 616.
[4] (1890) L. R. 24 Q. B. D. 742.

1908
Petherpermal Chetty
v.
Muniandy Servai.

steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June, 1895, being an inoperative instrument, as, in effect, it has been found to be does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, Article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Note—If the object of the fraud is not accomplished either wholly or partially, then the person in whose hands the property is, is liable to give up the property to the transferor who attempted the fraud. Where the object of the fraudulent transfer was to deprive another person of specific property, it is accomplished when the transfer is effected and everything is done to give effect to that transfer. *Suryanarayana* v. *Butchaiah*, 3 L.W. 111 (114-5). See also notes on *Jadu Nath* v. *Rup Lal*, (I. L. R. 33 Calc. 967.) at p 87 of this book.

The principle of the decision in the leading case is inapplicable to transactions in which the law requires the name of the actual purchaser to be certified in a document by the Court. *Ramaswami* v. *Venkappaier*, 3 L. W. 233.